SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 909.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 3305

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Solicitors of Record.

Hon. T. W. GREGORY, Attorney General, Washington, D. C.,

Hon. EDWARD C. DAY, United States Attorney, Helena, Montana,

Solicitors for Plaintiff and Appellant.

Hon. C. W. BUNN, and Hon. CHARLES DONNELLY, of St. Paul, Minn., and Messrs. GUNN & RASCH, of Helena, Mont.,

Solicitors for Defendant and Appellee. [1*]

In the District Court of the United States, in and for the District of Montana.

No. 57—IN EQUITY.

UNITED STATES OF AMERICA,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on June 5, 1915, the complainant filed its Bill of Complaint herein, being in the words and figures following, to wit: [2]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Bill of Complaint.

To the Judge of the District Court of the United States for the District of Montana:

The United States of America, by the Attorney General and B. K. Wheeler, United States Attorney for the District of Montana, files this its bill of complaint against the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, and thereupon complains and shows to your Honor:

I.

That the defendant Northern Pacific Railway Company is now, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the Northern Pacific Railroad Company was a corporation organized and existing under and by virtue of the Act of Congress of the United States, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and tele-

graph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route." (13 Stats. 365.)

III.

That the said defendant Northern Pacific Railway Company is the assignee and successor in interest of the said [3] Northern Pacific Railroad Company, of, in and to all properties, lands, rights, grants, privileges and franchises granted to said Northern Pacific Railroad Company by the aforesaid Act of Congress approved July 2, 1864, and by all acts supplemental thereto and amendatory thereof.

IV.

That at all of the times herein mentioned, prior to the 24th day of June, 1909, the complainant was the owner, in fee simple, of all those certain lands situated in the County of Gallatin, in the State and District of Montana, and within the Bozeman Land District, of which the land office is at Bozeman, Montana, particularly described as follows, to wit:

The South half (S. ½), of Section Twenty-nine (29), containing three hundred twenty (320), acres; all of Section Thirty-one (31), containing six hundred twenty-six and fifty-six hundredths (626.56), acres; all of Section Thirty-three (33), containing six hundred forty (640), acres; and the Southwest quarter (SW. ¼), and the West half of the Southeast quarter (W. ½ SE. ¼), of Section Thirty-five (35), containing two hundred forty (240), acres; all being in Township Eight (8), South of Range Four (4), East of Montana Principal Meridian;

The South half (S. ½), of Section Five (5), containing three hundred twenty (320), acres; all of Section Seven (7), containing six hundred twenty-nine and forty hundredths (629.40), acres; all of Section Nine (9), containing six hundred forty (640), acres; the North half of the Southwest quarter (N. ½ SW. ¼), and the North half (N. ½), of Section Fifteen (15), containing four hundred (400), acres; the Southwest quarter (SW. ¼), the North half of the Southeast quarter (N. ½ SE. ¼), the Southeast quarter of the Southeast quarter (SE. ¼ SE. ¼), and the North half (N. ½), of Section Seventeen (17), containing six hundred (600), acres; all of Section Nineteen (19), containing six hundred thirty-two and twelve hundredths (632.12), acres; and all of Section Thirty-one (31), containing six hundred thirty-three and sixty-eight hundredths (633.68), acres; all being in Township Nine (9), South of Range Five (5), East of Montana Principal Meridian; and containing in all five thousand six hundred and *eight*-one and seventy-six hundredths (5,681.76) acres.

V.

That on the 10th day of February, 1899, and in accordance with, and under the authority granted by, the Act of [4] Congress, approved March 3, 1891, entitled "An Act to repeal timber culture laws, and for other purposes" (26 Stats. 1103), the President of the United States by Proclamation established and created The Gallatin Forest Reserves in the State and District of Montana, and caused to be withdrawn from entry, sale, or other disposal, certain

vacant and unappropriated public lands of the United States for such forest reserves.

VI.

That on the 29th day of January, 1904, the Acting Commissioner of the General Land Office of the United States, acting under the direction and authority of the President of the United States, and the Secretary of the Interior of the United States, by letter "R" 1904–18,567, temporarily withdrew from entry, sale, or other disposal, excepting under the mineral laws of the United States, all of the lands hereinbefore particularly described, together with other lands, pending determination as to the advisability of including all of said lands within an addition to the aforesaid The Gallatin Forest Reserves, and that all of the lands hereinbefore particularly described, together with the other lands so withdrawn as aforesaid, were, at the time of such withdrawal from entry, sale, or other disposal, vacant, unappropriated lands of the United States, situated within the Bozeman Land District, of which the land office is at Bozeman, Montana.

And that the said letter "R" 1904–18, 567, withdrawing said lands from entry, sale or other disposal, as aforesaid, was duly and regularly transmitted by the Acting Commissioner of the General Land Office to the Register and Receiver of said Bozeman Land Office, and was regularly and duly received by said Register and Receiver of said Bozeman Land Office and filed with the records of said Bozeman Land Office on the 3d day of February, 1904. [5]

VII.

That the aforesaid order of the Acting Commissioner of the General Land Office withdrawing said lands from entry, sale, or other disposal, was never revoked or annulled, and that no portion of the lands included therein were ever, at any time or at all, excluded or exempted from the aforesaid order of withdrawal.

VIII.

That while all of said lands, including the lands hereinbefore particularly described, were so withdrawn from entry, sale, or other disposal, by the said order of withdrawal of the Acting Commissioner of the General Land Office, as aforesaid, the President of the United States, on the 7th day of March, 1906, in accordance with, and under the authority granted by the Act of Congress, approved June 4, 1897, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," by proclamation, added to and included within the aforesaid The Gallatin Forest Reserves all of the lands, including the lands hereinbefore described, which had theretofore been withdrawn from entry, sale, or other disposal under the aforesaid order of withdrawal of the said Acting Commissioner of the General Land Office.

IX.

That thereafter, by Executive Order of July 1, 1908, the aforesaid Gallatin Forest Reserves, and certain other forest reserves theretofore created and established by Proclamation of the President of the

United States, were consolidated and designated as the Gallatin National Forest.

X.

That none of the lands hereinbefore particularly described and added to and made a part of said The Gallatin [6] Forest Reserves, as hereinbefore set forth, were ever, at any time, withdrawn, exempted or excluded from the aforesaid The Gallatin Forest Reserves, or withdrawn, exempted or excluded from the aforesaid Gallatin National Forest, and that all of said lands were, from the 7th day of March, 1906, up to and including the 1st day of July, 1908, included within and a part of the aforesaid The Gallatin Forest Reserves, and that all of said lands, ever since the 1st day of July, 1908, have been and now are included within and a part of the aforesaid Gallatin National Forest.

XI.

That on or about the 5th day of April, 1905, and while said lands, hereinbefore particularly described, were so withdrawn from entry, sale, or other disposal, as aforesaid by the said letter "R" of the Acting Commissioner of the General Land Office, the said defendant, Northern Pacific Railway Company, as the assignee and successor in interest of said Northern Pacific Railroad Company, filed in the said United States Land Office at Bozeman, Montana, a certain list of lands, designated and known as "List No. 120 (Indemnity)," which said list described, among others, the lands hereinbefore particularly described, for the purpose of selecting said lands in said list described as indemnity lands in lieu of lands

theretofore classified as mineral lands and which said lands, so classified as mineral lands, were within the twenty mile place limits of the grant of lands made to said Northern Pacific Railroad Company by the Act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route" (13 Stats. 365), and by reason of the same being classified as mineral lands had been lost to the said Northern Pacific Railroad Company, and to its assignee and successor in interest the defendant, [7] Northern Pacific Railway Company; and that all of said lands described in said list and so selected as indemnity lands, as aforesaid, were and are situated within the indemnity limits within which such indemnity lands might be selected by said Northern Pacific Railroad Company, or by its assignee and successor in interest the defendant, Northern Pacific Railway Company, in accordance with the provisions of said Act of July 2, 1864.

XII.

That, in order to obtain patent to the said lands, described in said list, as indemnity lands, under the said Act of Congress of July 2, 1864, it was necessary for said defendant to file said list in said Bozeman Land Office and to secure from the Register and Receiver of said Bozeman Land Office a certificate of approval thereof, and a receipt showing that the proper fees had been paid to said Register and Receiver, and it was also incumbent upon said de-

fendant to prove to the satisfaction of the said Register and Receiver of said Bozeman Land Office, and to the officers of the complainant's General Land Office, whose duty it was to decide whether a patent thereon might lawfully be issued, by satisfactory testimony and evidence, that the said lands described in said list were of the character contemplated by the aforesaid Act of July 2, 1864, and were at the time of the filing of the aforesaid list subject to selection by said defendant as indemnity lands under the provisions of said Act.

And that attached to and made a part of said list, so filed by said defendant, as aforesaid, was an affidavit made and executed by Thomas Cooper, the duly authorized Land Commissioner of said defendant, and which said affidavit was duly acknowledged before a notary public residing in the County of Ramsey, State of Minnesota, in which said affidavit it was alleged, claimed and asserted, among other things, [8] that said list of lands, and said lands, were a portion of the public lands claimed by the said defendant Northern Pacific Railway Company as enuring to it under the aforesaid Act of July 2, 1864, and that said lands, at the time of the filing of said list, were then and there vacant and unappropriated and were not interdicted nor reserved lands and were of the character contemplated by said Act, and were situated within the limits of fifty (50) miles of each side of the line of route of said railroad; and that at the time of the filing of said list and affidavit the said defendant paid to the Register and Receiver of said Bozeman Land Office the sum

of Ninety-two Dollars as an assessment of the fees payable to said Register and Receiver, and then and there obtained and received from said Register and Receiver a certificate and receipt approving said list and certifying, among other things, that said list was found to be accurate by a search of the records and plats of said Bozeman Land Office, and that the whole of said lands were surveyed public lands of the United States, and within the fifty mile limits on each side of the line of route of said railroad, and that the same were not, nor was any part thereof, returned or denominated as mineral land, or lands, nor claimed as swamp-lands, nor was there any homestead, pre-emption, state, or other valid claim to any portion of said lands on file or of record in said United States Land Office.

And that thereafter such proceedings were had that on the 24th day of June, 1909, a patent was issued by the United States to said defendant Northern Pacific Railway Company for the lands hereinbefore particularly described, together with other lands, which said patent was duly delivered to and received by said defendant Northern Pacific Railway Company. [9]

XIII.

That the said lands, hereinbefore particularly described, were not, at the time of the filing of said list by the defendant in said Bozeman Land Office, as aforesaid, unreserved public lands of the United States subject to selection by said defendant as indemnity lands in lieu of lands granted to said Northern Pacific Railroad Company by said Act of July

2, 1864, and which lands, so granted, had been lost to said Northern Pacific Railroad Company, and to this defendant, by reason of the same having been classified as mineral lands, but that said lands were, at the time of the filing of said list in said Bozeman Land Office, reserved lands which had been withdrawn from entry, sale, or other disposal, for the purposes hereinbefore set forth, and were not subject or open to selection by the defendant as indemnity lands under any provisions of said Act; and that said lands, hereinbefore particularly described, were not, at the date of the issuance of patent to the defendant therefor, as aforesaid, unreserved public lands of the United States which might lawfully be conveyed to said defendant as indemnity lands in lieu of lands granted to the Northern Pacific Railroad Company by said Act of July 2, 1864, and which lands, so granted had been lost to said Northern Pacific Railroad Company, and to the defendant, by reason of the same having been classified as mineral lands, but that said lands were, at the date of the issuance of said patent therefor, reserved lands belonging to and being a part of the aforesaid Gallatin National Forest.

XIV.

That the said receipt and certificate, hereinbefore referred to, issued to the said defendant by the Register and Receiver of the United States Land Office at Bozeman, Montana, as aforesaid, was issued to said defendant by said Register and Receiver through inadvertence and mistake in overlooking the aforesaid letter "R" of the Acting Commissioner

[10] of the General Land Office withdrawing said land from entry, sale or other disposal, and that the patent issued to said defendant by the United States, for said lands, as aforesaid was issued by the officers of the complainant through inadvertence and mistake in overlooking the aforesaid letter "R" of said Acting Commissioner of the General Land Office withdrawing said lands from entry, sale or other disposal, and through inadvertence and mistake in overlooking the aforesaid proclamation of the President of the United States issued on the 7th day of March, 1906, by which said proclamation said lands were added to and made a part of the aforesaid Gallatin National Forest, as aforesaid, and that by reason of such inadvertence and mistake on the part of the said Register and Receiver and on the part of the aforesaid officers of the complainant said patent was erroneously issued and delivered to said defendant Northern Pacific Railway Company.

XV.

That after the issuance of said patent, and on or about the 6th day of November, 1914, this complainant demanded of said defendant that it reconvey to the United States the lands hereinbefore particularly described, but that the said defendant then and there refused and still refuses so to do.

XVI.

That the existence of said patent, so obtained and procured by said defendant, as aforesaid, on its face entitles the said defendant, and its assignees, to exercise the right of absolute ownership of and over said lands and assert a legal title to the same to

which the said defendant is not entitled, and that if said patent remains uncancelled and in force the same may be used in fraud of your orator and of all persons relying upon the same as a valid and substantial conveyance of the legal title to said lands and premises; all [11] of which acts and doings are contrary to equity and good conscience and to the manifest injury of the complainant.

THEREFORE, THE PREMISES CONSIDERED, complainant prays: That for as much as complainant is without full and adequate remedy in the premises, save in a court of equity, to the end that the defendant may make full, true and direct answer to all and singular the matters and things herein set forth, as fully as if it had been fully interrogated thereunder, but not under oath (an answer under oath being hereby expressly waived), and to the end that the said patent may be declared null and void, and be set aside, revoked and held for naught, and be delivered up to complainant and surrendered for cancellation, and that the said defendant, be forever perpetually restrained and enjoined from setting up, asserting or claiming any rights, privileges or advantages under said patent, and that all and singular all of said lands may be adjudged and decreed to be the perfect property of the complainant full and clear of all claims of said defendant, and that said defendant, during the progress of this cause, and thereafter, be finally and perpetually enjoined from setting up any claim to said lands, or to any part thereof, and from creating any cloud upon complainant's title thereto.

May it please your Honor to grant unto the complainant a writ of subpoena of the United States of America, issued out of and under the seal of this Court, directed to the said defendant Northern Pacific Railway Company, commanding it at a certain time and place to appear and answer unto this bill of complaint, and to abide by and perform such orders and decree in the premises as the Court shall deem proper and required by the principles of equity and good conscience.

And your complainant prays for such other and further relief in the premises as to your Honor shall seem proper and meet and agreeable to equity.

T. W. GREGORY,
Attorney-General. [12]
BURTON K. WHEELER,
United States Attorney, District of Montana.

United States of America,
District of Montana,—ss.

Burton K. Wheeler, being first duly sworn, deposes and says: that he is the regularly appointed, qualified and acting United States Attorney for the District of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated and alleged are true to the best of his knowledge, information and belief.

BURTON K. WHEELER.

Subscribed and sworn to before me this 5th day of June, 1915.

[Seal] HARRY H. WALKER,
Clerk of the U. S. District Court, District of Montana.

Filed June 5, 1915. George W. Sproule, Clerk. By Harry H. Walker, Deputy. **[13]**

Thereafter, on June 22, 1915, defendant's Answer was duly filed herein, in the words and figures following, to wit: **[14]**

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Answer of the Northern Pacific Railway Company to the Bill of Complaint of the United States.

The defendant, reserving all right of exception to said bill of complaint, for answer thereunto says:

I.

It is true that the defendant is a corporation and is the assignee and successor in interest of the Northern Pacific Railroad Company of, in and to all properties, lands, rights, grants, privileges and franchises granted to the Northern Pacific Railroad

Company by Act of Congress approved July 2, 1864, as alleged in the bill.

II.

It is true that the complainant was the nominal owner of all the lands described in the bill at all times prior to the 24th day of June, 1909, but the defendant denies that the complainant's ownership was other than formal, and alleges that all of said lands were appropriated in satisfaction of the land grant [15] to the Northern Pacific Railroad Company, as hereinafter alleged.

III.

It is true that the Gallatin Forest Reserve was established as alleged and that on the 29th day of January, 1904, the Acting Commissioner of the General Land Office in form temporarily withdrew from sale, entry or other disposal, excepting under the mineral laws, all the lands described in the bill, together with other lands, pending determination as to the desirability of including them within an addition to the Gallatin Forest Reserves, but whether the action of the Acting Commissioner of the General Land Office was under the direction and authority of the President of the United States and the Secretary of the Interior, the defendant has no knowledge or information. It is true that the Acting Commissioner's letter withdrawing said lands was regularly transmitted to and duly received by the Register and Receiver of the local land office at Bozeman, Montana, and filed in the records of said office, as alleged, and that the lands described in the bill were at the time of such withdrawal vacant, unappropri-

ated lands within said Bozeman land district, but were subject to the rights of the defendant as hereinafter alleged.

The defendant does not know and has no information as to the allegations in Paragraph VII of the bill, but has no reason to doubt their truth.

IV.

It is true that the President of the United States issued the proclamation of March 7, 1906, and the executive order of July 1, [16] 1908, as alleged, but whether any of said lands were ever excluded from the Gallatin Forest Reserves or Gallatin National Forest, the defendant has no knowledge or information, but it believes that all said lands have been and now are within said Gallatin National Forest.

V.

The defendant admits all the allegations of Paragraphs XI and XII of the bill, but denies that said lands were not open to its selection as indemnity for the loss of lands within the place limits of said grant, and denies that the receipt and certificate issued by the Register and Receiver of the Bozeman Land Office was issued to defendant through inadvertence and mistake, and denies that said patent was issued or delivered through inadvertence and mistake, and alleges that all said proceedings were had with full knowledge of all the facts on the part of the officers of the Land Department of the United States.

VI.

It is true that the complainant has demanded a reconveyance of the lands described in the bill, as al-

leged, and that the defendant refuses to make reconveyance.

VII.

Further answering, the defendant alleges that by the third section of said Act of Congress of July 2, 1864, lands were granted to the Northern Pacific Railroad Company, as follows:

> "That there be, and hereby is, granted to the Northern Pacific Railroad Company * * * every alternate section of public land, not mineral, designated by odd numbers to the amount [17] of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not

more than ten miles beyond the limits of said alternate sections * * *

"Provided, further, that all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road and within fifty miles thereof may be selected as above provided."

By a joint resolution adopted by the Senate and House of Representatives of the United States, approved May 31st, 1870, and entitled: "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," it was further provided with respect to the said Northern Pacific [18] Railroad Company that

"in the event of there not being in any State or territory in which said main line or branch line may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said Company, within the limits prescribed by its charter, then said Company shall be entitled under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other

lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the Act of July two, eighteen hundred and sixty-four."

VIII.

On the 6th day of July, 1882, the Northern Pacific Railroad Company duly filed in the office of the Commissioner of the General Land Office a map or plat showing the definite location of that portion of its road extending from the last crossing of the Yellowstone River to Little Blackfoot River in the State of Montana, which map was duly approved by the Secretary of the Interior.

IX.

Thereafter the Commissioner of the General Land Office prepared and filed in his office a map fixing the 40-mile and 50-mile limits of said land grant, co-terminous with that portion of the road so definitely located July 6th, 1882, upon which map **[19]** the lands here involved are indicated as being more than 40 miles but less than 50 miles from said line of road.

X.

Thereafter the said Northern Pacific Railroad Company duly definitely located the whole of its line of railroad extending from a point on Lake Superior in the State of Wisconsin, westwardly to a point on Puget Sound, and thereafter duly constructed and completed its said line of railroad and telegraph line upon said line of definite location, in all respects as

required by the provisions of said Act of Congress approved July 2, 1864.

XI.

On the 15th day of October, 1896, the Northern Pacific Railroad Company duly sold and conveyed to this defendant all its right, title and interest in the lands granted by Congress, as well as its right to receive lands within the indemnity limits of said grant in lieu of lands within the place limits thereof but excepted therefrom.

XII.

On the 29th day of February, 1904, the Secretary of the Interior directed the Commissioner of the General Land Office to readjust the said grants made by the Act of July 2, 1864, and the Joint Resolution of May 31, 1870.

On the 26th day of March, 1906, the Commissioner of the General Land Office addressed a communication to the Secretary of the Interior in response to his direction of February 29, 1904, by which he submitted tabulated statements showing in detail and in condensed form the results of such readjustment. In said communication [20] the Commissioner reported the result of his re-adjustment in the following words: "According to said statements the grant of 1864 is shown to be deficient by 3,666,451.74 acres and the grant of 1870 by 532,029.73 acres, a total in both grants of 4,198,481.47 less 106,008.48 acres which the company has selected as indemnity under the Act of July 1, 1898 (30 Stat. 597–600) outside the area of this examination, thus leaving a net deficiency of 4,092,472.99 acres."

XIII.

The lands described in the bill are all unoccupied and unappropriated agricultural lands more than 40 miles but less than 50 miles from that portion of the line of the Northern Pacific Railroad Company between the last crossing of the Yellowstone River and the Little Blackfoot River definitely located July 6, 1882, and are in all respects such lands as Congress gave to the Northern Pacific Railroad Company the right to select in lieu of portions of odd numbered sections of land within the 40-mile limits of said grant but excepted therefrom because of conditions specified in said Act of Congress, and remained unsurveyed until April 5, 1905, when a plat of Government survey including said lands was filed in the local land office at Bozeman, Montana.

XIV.

The defendant asserts and alleges that long prior to the 29th day of January, 1904, the quantity of public lands of the United States within 50 miles of the line of the road of the Northern Pacific Railroad Company from Lake Superior to Puget Sound, as well as within the 60-mile limit fixed by said joint [21] resolution of May 31, 1870, had been diminished by withdrawals and other adverse appropriations until there remained within 50 miles of the line of the road and within said 60-mile limit, a quantity of public lands, surveyed and unsurveyed, and applicable to indemnity selection, insufficient to satisfy the losses within the place limits of the grant of July 2, 1864, by many hundreds of thousands of acres, and on and prior to the 29th day of January, 1904, the

Northern Pacific Railway Company required all the lands described in the bill and hundreds of thousands of acres more in satisfaction of the losses within the place limits of said grant, which it had theretofore sustained.

That all the lands described in the bill and in Bozeman Indemnity Selection List No. 120, together with other lands theretofore selected, were the nearest available public lands to the line of said road, and the defendant's right to them vested long prior to the 29th day of January, 1904, and at the time when there remained within 50 miles of the road insufficient public lands to satisfy the losses within place limits.

XV.

The defendant alleges that notwithstanding the Act of Congress of March 3, 1887, authorized and directed the Secretary of the Interior immediately to adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, the Secretary of the Interior, claiming to act under that provision of said land grants which required indemnity selections to be made under his direction, has required all railroad indemnity selection lists to be filed in the local land offices, but has prohibited the filing of any such list until the lands to be selected have been surveyed and [22] the plats of survey officially filed and the lands declared to be open to appropriation under the public land laws.

XVI.

The defendant alleges that it has duly filed selection lists for all vacant public lands in odd numbered sections within 50 miles of the line of its railroad and for all vacant public lands within said 60-mile limit; that it requires all of the lands so selected in part satisfaction of its grant, and that if it shall receive all the lands so selected and all unsurveyed lands within the limits fixed by its charter and by said joint resolution of May 31, 1870, and available in satisfaction of losses within place limits, together with the lands described in the bill, it will not receive within several million acres the full measure of its grant.

XVII.

The defendant alleges that the lands described in said Bozeman Indemnity Selection List No. 120 as the lands lost to the grant for which indemnity was sought by said selection list, were in fact within the place limits of said grant but excluded therefrom because of their mineral character and their classification and approval as such on July 7, 1898, in pursuance of the Act of Congress of February 26, 1895, providing for the classification of lands within the limits of the grant of July 2, 1864; that the defendant, complying in all respects with the instructions of the Secretary of the Interior, duly selected the lands described in the bill of filing its said selection list No. 120 in the United States District Land Office at Bozeman, Montana, on the 5th day of April, 1905, and paid to the local land officers of said district all fees required by law, and the defendant

alleges that the fact is as [23] certified by said local land officers that at the date of the filing of said selection list said lands were public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption or other claims and rights than the rights of the defendant, unless the letter "R" of the Acting Commissioner of the General Land Office, of January 29, 1904, referred to in the bill, temporarily withdrawing from entry the lands described in the bill, is a valid reservation as against the vested rights of the defendant.

XVIII.

The defendant alleges that the Northern Pacific Railroad Company and Northern Pacific Railway Company have fully complied with all the terms and conditions of said Act of Congress of July 2, 1864, with respect to the grant of lands thereby made, and are entitled to receive patents for all lands granted to them and for all lands within the indemnity limits of the character designated by said grant as available to supply deficiencies in the place limits of said grant ascertained as existing at the date of definite location of the railroad, and in the prosecution of their claims for said lands have done all that they can do and all that the law requires to be done, and were prevented from presenting their claims to the lands described in the bill prior to the 5th day of April, 1905, by the arbitrary action of the Secretary of the Interior in refusing to receive selections of indemnity lands until the lands selected have been surveyed. [24]

And the defendant prays to be hence dismissed with reasonable costs and charges.

NORTHERN PACIFIC RAILWAY COMPANY,

[Seal] Attest: R. H. RELF,
Assistant Secretary.

GUNN, RASCH & HALL,
Solicitors for Defendant.

Service of the within answer admitted and receipt of copy thereof acknowledged this —— day of June, A. D. 1915.

B. K. WHEELER,
U. S. Attorney.

Filed June 22, 1915. Geo. W. Sproule, Clerk. [25]

Thereafter on the 4th day of May, 1917, Agreed Statement of Facts was filed herein, being in the words and figures following, to wit: [26]

In the District Court of the United States in and for the District of Montana.

No. 57—IN EQUITY.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant.

Agreed Statement of Facts.

1. The lands involved in this suit are nonmineral lands situated in the Bozeman land district in the State of Montana and within 50 miles, and more than 40 miles, of the line of railway constructed by the predecessor of the defendant under the Act of July 2, 1864 (13 Stat. 365), and lie opposite that portion of the line of road which was definitely located July 6, 1882.

2. January 29, 1904, under the direction and authority of the Secretary of the Interior and the President of the United States, the Commissioner of the General Land Office issued an order temporarily withdrawing from entry, sale and other forms of disposal, excepting under the mineral land laws of the United States, a certain area within whose exterior boundaries the tracts in controversy are situated, and this order of withdrawal was duly transmitted to and received by the register and receiver of the local land district in which said lands are situated. This withdrawal was made pending determination as to the desirability of including the lands so withdrawn within the Gallatin Forest Reservation, and by proclamation of March 7,1908, the [27] President of the United States included the area so withdrawn, which embraced in its exterior limits the lands involved in this controversy, within the said Gallatin Forest Reserve. The name of this forest reserve was changed by Executive Order of July 1, 1908, to the Gallatin National Forest, with-

in whose boundaries the said lands have ever since been included.

3. At the time that the order of withdrawal above mentioned was issued in 1904, the lands in controversy had not been officially surveyed, and they were not so surveyed until April 5, 1906, on which date the defendant filed in the local land office at Bozeman, Montana, its indemnity selection list No. 120, whereby it applied to select the lands involved in this suit in lieu of mineral lands within the place or granted limits of its grant, on account of which the defendant was entitled to make indemnity selection of lands subject to such selection; and the lands in controversy were subject to such selection unless the order of the Commissioner of the General Land Office issued January 29, 1904, pursuant to the direction and authority of the Secretary of the Interior and the President of the United States, as heretofore stated, was sufficient, under the law, to withdraw said lands from such selection.

4. The list of selections so filed by the defendant in the local land office at Bozeman, Montana, was forwarded to the Commissioner of the General Land Office at Washington, D. C., by the register of the local office at Bozeman on April 7, 1905. The letter forwarding the list contained the following statement:

> We doubt very much whether we should have allowed this list to become of record, for the reason that it is within the limits of the Proposed Addition to the Gallatin Forest Reserve, but thought best to leave it to your office for

action, inasmuch as you could order the list cancelled if you desired to do so. [28]

On examination in the General Land Office of the original list of selections so filed by the defendant, the examiner noted opposite the several tracts selected the following: "addition to Gallatin Forest Jan. 29, 1904 (Reserve)."

5. The original list of selections embracing these lands was not approved by the Commissioner of the General Land Office or the Secretary of the Interior, nor was it the practice to approve original lists, but following the customary procedure the lands described therein were included within a further list prepared in the General Land Office designated as a clear list, which was submitted to the Secretary of the Interior for his approval, and the clear list so submitted to the Secretary of the Interior for his approval bore the following certificate from the Examiner, the Chief of the Railroad Division, and the Commissioner of the General Land Office:

May 27, 1909.

It is hereby certified that the foregoing list has been examined in connection with the plats and records of this office and the tracts therein selected found to be vacant and unappropriated lands falling within the indemnity limits of the grant to aid in the construction of the Northern Pacific Railroad (now Railway), and appear to be subject to approval and patent under the grant, having been classified and approved as non-mineral lands, while the tracts

therein designated as bases for said selection were found to have been lost to said grant and not heretofore used as bases for any approved selections.

It is further certified that the foregoing lands have been examined in the field by a special agent of this office who has reported the same to be non-mineral lands and recommends that the land be patented to the Company.

Now, Therefore, as it has been found on a careful examination in connection with the authenticated map on file in the General Land Office of the survey of the Northern Pacific Railroad route, [29] that the foregoing lands fall within the fifty miles lateral limits of said route and that the said lands, so far as the returns to the General Land Office show, are free from conflict, it is hereby recommended that the described tracts, covering seven thousand, forty-nine acres and sixty hundredths of an acre, be approved and carried into patent as lands falling within the grant by the Acts aforesaid, and inuring to the said Northern Pacific Railway Company as successor in interest to the Northern Pacific Railroad Company.

Neither the clear list so submitted to the Secretary of the Interior nor any of the certificates, or statements appearing thereon, showed that the lands in controversy had been withdrawn for national forest purposes; nor was any mention made thereof in the letter of transmittal written by the Commissioner of the General Land Office June 16, 1909,

submitting the clear list to the Secretary of the Interior for his approval.

6. The clear list so submitted was approved by the Secretary of the Interior June 16, 1909, and thereafter a patent was issued for said lands, to the defendant, on June 24, 1909.

7. On November 6, 1914, the Acting Assistant Commissioner of the General Land Office addressed a letter to Washington counsel for defendant, in reference to the lands in controversy, and in that letter it was stated that as the tracts in question were selected subsequent to the order of withdrawal, the selection thereof was inadvertently allowed and the patenting of the tracts was erroneous, in view of which a demand was made upon the defendant railroad company to reconvey the tracts in question to the United States.

8. Since long prior to the year 1904 the regulations of [30] the Department of the Interior respecting selections of land in satisfaction of losses within the granted limits of railroad land grants have required that such selection lists shall be filed in the local land offices in which the lands selected are respectively located, and under such regulations such indemnity selections may not be made until the lands selected have been surveyed and the plats thereof officially filed in the local land offices and the lands declared to be open to entry under the public land laws.

9. Prior to the year 1904 the defendant attempted to select public lands while they remained unsurveyed, as indemnity for loss of lands in its

granted limits, and contended that it had a right to make such selections. The Secretary of the Interior, however, has uniformly refused to recognize all such lists so filed for unsurveyed lands and has rejected them upon the ground that the selected lands had not been surveyed.

10. The defendant has applied to select all the unsurveyed odd-numbered sections of land within the indemnity limits of its grant, but in so doing did not assign specific losses of lands in the granted limits as bases for the proposed selections, and such proffer of selection has not been accepted by the Secretary of the Interior; and the defendant and its predecessor, the Northern Pacific Railroad Company, has filed selections of all surveyed public lands in odd-numbered sections within the indemnity belts of its grant, which were subject to selection under the regulations [31] of the land department.

11. By the Act of March 3, 1887 (24 Stat. 556), the Secretary of the Interior was

> directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Shortly after the passage of this act the Commissioner of the General Land Office prepared a statement in adjustment of the Northern Pacific land grant, which represented what was styled a deficiency in said grant. This statement was revised in the year 1904 and, in accordance with the specific direction of the Secretary of the Interior, was for-

warded to him by the Commissioner of the General Land Office with the latter's letter of May 26, 1906. This statement likewise showed what the Commissioner represented as a deficiency in the grant of 4,092,472.99 acres.

In reaching this result the Commissioner estimated the area of the grant to be the aggregate area of all odd-numbered sections lying within 20 miles of the line of railroad as definitely located in the states and within 40 miles of the said road as definitely located in the territories through which the said railroad extended; and, taking that as a basis, found that the sum total of acres granted exceeded by the number of acres above stated the sum total of acres that had been previously patented to or selected by the defendant plus all other lands within the primary and all indemnity limits that were regarded as subject to patenting [32] under the grant.

The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the primary or place limits, not patented, but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains; but the plaintiff does not admit that the correct measure of the grant is the

aggregate area of all odd-numbered sections within the primary or place limits, or that any definite quantity of land was granted and guaranteed to the defendant by any of the acts of Congress making grants of land to the defendant or its predecessor or predecessors in interest.

12. No map showing the definite location or general route of the railroad authorized by the act of 1864 was filed in the Interior Department until August 13, 1870, when a map was filed indicating the general route from the mouth of the Montreal River in Wisconsin to the mouth of the Walla Walla River in the then Territory of Washington. Thereafter maps of general route and definite location showing the location of various sections of the road were filed from time to time until November, 1884; and between the date of the grant [33] in 1864 and the definite location of the various sections of the road, the United States disposed of more than four million, two hundred thousand acres of odd-numbered sections falling within the primary or granted limits of the road as finally and definitely located. The construction of the entire road was not completed prior to the year 1887.

13. The line of railroad, to aid in whose construction the land grant in question was made, extends from Lake Superior in Wisconsin to Tacoma and Portland in the States of Washington and Oregon, and runs into or through the following States: Minnesota, Wisconsin, North Dakota, Montana, Idaho, Washington and Oregon. The population of these

States in 1860, 1870 and 1880, as shown by the census reports for those years, was as follows:

State or Territory	Population 1860.	1870.	1880.
Idaho	a/	14,999	32,610
Minnesota	172,023	439,706	780,773
Montana	b/	20,595	39,159
North Dakota	c/	2,405	36,909
Oregon	52,465	90,923	174,768
Wisconsin	775,881	1,054,670	1,315,497
Washington	11,594	23,955	75,116

a/ Organized as a territory March 3, 1863.

b/ Organized as a territory May 26, 1864.

c/ Dakota organized as a territory March 2, 1861.

14. Under the acts of July 1, 1898 (30 Stat. 597, 620), March 2, 1899 (31 Stat., 950), and May 17, 1906 (34 Stat. 197), the defendant has selected in excess of 20,000 acres of lands in the State of Oregon, outside of the limits of its grant but within the indemnity limits of the grant made by Congress under [34] the act of 1866, to aid in the construction of a railroad from Portland in Oregon to the southern boundary of the State. At the time of their selection by the defendant these lands were unsurveyed and for that reason their selection by the Oregon and California Railroad Company, the beneficiary of the grant made by the act of 1866, would not have been allowed under the regulations of the Interior Department, notwithstanding the losses of lands within the place or granted limits of the Oregon and California Railroad grant exceeded the total area of the odd-numbered sections within the indemnity limits of that grant.

This stipulation is not intended to preclude the Court from taking cognizance of any matters not mentioned herein of which the courts ordinarily take judicial notice.

BURTON K. WHEELER,
United States Attorney.
C. W. BUNN,
M. S. GUNN,
CHARLES DONNELLY and
CARL RASCH,
Attorneys for Defendant.

Filed May 4, 1912. Geo. W. Sproule, Clerk.

[35]

Thereafter on the 2d day of November, 1918, Opinion of the Court was filed herein, being in the words and figures following, to wit: [36]

United States District Court, Montana.

UNITED STATES
vs.
NORTHERN PAC. RY. CO.

Opinion.

This suit to cancel a patent to 5,681 acres of land is tried on an agreed statement of facts, from which it appears that the lands are within the first indemnity belt of the Northern Pacific land grant; that in 1904 the Interior Department temporarily withdrew them from disposition and for possible inclusion in a National Forest; that in 1906 the lands were surveyed and defendant applied for them as indemnity

for lost lands; that in 1908 by executive order the lands were included in a National Forest; that in 1909 defendant's application was approved and the patent issued; that prior to said temporary withdrawal it had been ascertained by the Interior Department that even though all lands of selective character within the indemnity belts, including the lands involved herein were appropriated to defendant's grant, defendant would receive 4,086,000 acres less than it is entitled to, less than the grant; and that this deficiency exists now.

The law of grants is well settled by the Supreme Court. Defendant's grant is a contract with the United States, wherein defendant agreed to construct a railroad in consideration of which the United States agreed to give defendant a certain amount of lands. Defendant constructed the road and had performed its agreement 35 years ago. The United States has not given defendant all the lands promised, has not performed its agreement. And it has disabled itself to perform, its default depriving [37] defendant of over 4,086,000 acres of the promised lands. In 1864 when the grant was made, the Western country wherein it is situated was virtually wilderness. A principal object of the grant was to further the National public policy of settling and developing the West, to provide place for the restless, discontented, adventurous and ambitious of the crowding East, and to postpone the social problems always presented by increasing population and decreasing natural resources. The United States made a good bargain for this object was well accomplished.

In due time all granted lands within the 40 miles place limits were withdrawn from settlement, but in order that the aforesaid public policy be not unduly impeded, the lands within the indemnity limits and which to some unknown extent would be necessary to indemnify defendant for lands lost within the place limits, were not withdrawn. For it was not anticipated by Congress that settlement would be so rapid, surveys so slow, and losses so great, that there would be a shortage of indemnity lands. It was thought there would be a continuous surplusage of indemnity lands from which defendant could make up its losses of granted lands within place limits. Congress intended defendant should have the full acreage promised and to that end, in 1870, created a second indemnity belt. The grant provides defendant shall select indemnity lands under the direction of the Secretary of the Interior.

So long as losses were few and indemnity lands many, defendant had no title to any of the latter until it had actively made choice amongst them, had by and in selection definitely pointed out lands lost and lands chosen, had identified lands for indemnity and given notice to the United States. At the same time its right to indemnity and to select is a substantial vested right of which it cannot be deprived. In course of time defendant's losses increased [38] and indemnity lands decreased so that the former exceeds the latter. This invokes the principle expressed and recognized by the Supreme Court that thereupon defendant's title to all indemnity lands attaches and vests without active selection, and the

United States cannot otherwise dispose of them.

No excess of indemnity lands, defendant entitled to all and more than remains, it has neither power to choose nor duty to select. There is no need to identify them nor to bring notice of loss and indemnity chosen to the United States, nothing for the secretary to judicially determine. The indemnity lands are identified, noticed, selected, determined and appropriated to defendant in satisfaction of its grant by force of circumstances, by acts of the United States, and by the grant, as though by express and specific grant. What before was floating and indefinite has become fixed and definite. Thus is the intent of Congress accomplished and the grant performed and executed. The reason of the rule of active selection having ceased, the rule no longer applies.

St. Paul etc. Ry. Co. v. Ry. Co., 139 U. S. 1,
U. S. v. Ry. Co., 141 U. S. 376,
U. S. v. Ry. Co., 146 U. S. 616,
Hewitt v. Schultz, 180 U. S. 157,
Ry. Co. v. Bell, 183 U. S. 682,
Weyerhauser v. Hoyt, 219 U. S. 380,
Ry. Co. v. U. S., 223 U. S. 570,
Ry. Co. v. U. S., 189, U. S. 115.

This would seem to be the law of every variety of choice, election or selection.

If A sells B ten lots to be selected by the latter from twenty owned by A prior to selection, B has a vested right of selection but not title to any. If thereupon A conveys ten of the lots to C, B's right and title to the remaining ten attaches and vests.

And clearly A could not defeat B's right and title to the remaining ten lots by conveyance to another with notice, nor by shifting the lots to some other use of A's. [39]

The rule would be the same under like circumstances if B's right was to select in lieu of defeated title to other lots purchased from A, from and after losses were ascertained and noticed to A. So too if A's property is seized on execution he must select his exempt property from other property. But if it is all exempt, he need not select. In all these and like illustrations the circumstances and law relieve from active selection and appropriate the property to him having the right of selection.

When choice, election or selection and the field thereof become of equal extent, *ipso facto* they become one and the same. The beneficiary is presumed to consent until the contrary appears.

There are expressions by the Supreme Court that until active selection by grantees indemnity lands are open to disposal by the United States, by Congress; but these expressions are under circumstances unlike these of the instant suit and are not in conflict with the principle aforesaid. All are of suits wherein so far as appeared indemnity lands exceeded lost lands, requiring that the grantees choose, elect, select, identify and notify the United States of losses and indemnity in lieu thereof.

Furthermore, it is believed the Supreme Court had in mind disposal by virtue of express and specific direction by Congress, like that of Sec. 6 of the grant in favor of settlers, and not disposal by the

Interior Department in exercise of its will in administration of general laws. If under the present circumstances the Interior Department can dispose of some of these indemnity lands it can of all. It is not believed Congress intended said Department could knowingly and directly place the United States in default, violate its contract, damage defendant. Before statutes will be construed to such evil ends, their language must be much clearer thereto than that of this grant. [40]

In contracts, the United States is obligated to fair dealing, good faith and honesty even as persons are,—more, by way of good example. If the United States deliberately repudiates its contracts why expect its citizens to perform theirs? It is also believed the Supreme Court by "disposal" intended transfer, and not mere shifting to other National uses. Here the United States had full power to patent the lands as it did. And these expressions were largely inspired to further the policy aforesaid of settlement and by virtue of Sec. 6 of the grant. Again the reason ceases in that settlers' rights are not involved herein. It is noted that the grant assumes to apply only settlement laws to the first indemnity belt. Although not suggested by counsel by reason of the solemnity of patents and the strong proof requisite to impeach them, it might be presumed that the executive who included the lands in the National Forest and who has power to thereafter exclude them, intended to exercise this power by his issuance of this patent. However, it is as-

sumed the statement of facts is otherwise.

Decree for defendant.

Nov. 2, 1918.

BOURQUIN, J.

Filed Nov. 2, 1918. C. R. Garlow, Clerk. [41]

Thereafter on the 21st day of November, 1918, Decree was filed and entered herein, being in the words and figures following, to wit: [42]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Decree.

This cause came regularly on for hearing before the above-named court on Wednesday, June 27, 1917, on bill of complaint, answer and statement of agreed facts, and was duly argued by counsel for respective parties.

On consideration thereof, it is ORDERED, ADJUDGED and DECREED that the bill of complaint be, and the same is hereby dismissed.

GEO. M. BOURQUIN,
Judge of the District Court.

Dated November 21, 1918.

Filed and entered November 21, 1918. C. R. Garlow, Clerk. [43]

Thereafter on the 31st day of January, 1919, petition for appeal was filed herein, being in the words and figures following, to wit: [44]

In the District Court of the United States, District of Montana.

No. 57—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Petition for Appeal.

To the Honorable GEO. M. BOURQUIN, District Judge:

The above-named plaintiff, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 21st day of November, 1918, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed; that citation be issued as provided by law, and that a transcript of the record of proceedings and documents on which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, under the rules of said court in such cases made and provided.

Dated January 31, 1919.

EDWARD C. DAY,
United States Attorney for the District of Montana,

Attorney for Appellant.

Filed January 31, 1919. C. R. Garlow, Clerk. [45]

Thereafter on the 31st day of January, 1919, order allowing appeal was filed and entered herein, being in the words and figures following, to wit: [46]

In the District Court of the United States, District of Montana.

No. 57—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Order Allowing Appeal.

On motion of Edward C. Day, United States Attorney for the District of Montana, it is ordered that the appeal be allowed as prayed for, and that a certified transcript of the record, agreed statement of facts and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit.

GEO. M. BOURQUIN,
District Judge.

Filed January 31, 1919. C. R. Garlow, Clerk. [47]

Thereafter on the 31st day of January, 1919, citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [48]

In the District Court of the United States, District of Montana.

No. 37—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Citation on Appeal.

United States of America, to the Above-named Northern Pacific Railway Company, a Corporation, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the Northern District of California, within said Ninth Circuit, within thirty (30) days from the date of this citation, pursuant to an order allowing the appeal filed and entered in the office of the *office of the* Clerk of the District Court of the United States, for the District of Montana, from a final de-

cree signed, filed and entered on the 21st day of November, 1918, in that certain suit, being in Equity No. 57, wherein the United States is plaintiff and appellant and you the defendant and appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said order allowing the appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable GEO. M. BOURQUIN, United States District Judge for the District of Montana, this 31st day of January, 1919, and of the Independence of the United States the 143d.

GEO. M. BOURQUIN,
United States District Judge for the District of Montana.

Service of the foregoing Citation on Appeal, together with the order allowing appeal and assignment of errors, is hereby accepted and receipt of copies acknowledged this 31st day of January, 1919.

GUNN & RASCH,
Attorneys for Northern Pacific Ry. Co. [49]

[Endorsed]: No. 57. United States District Court, District of Montana. United States of America, Plaintiff, vs. Northern Pacific Railway Co., Defendant. Citation on Appeal. Filed Jan. 31, 1919. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [50]

Thereafter on the 31st day of January, 1919, assignment of errors was filed herein, being in the words and figures following, to wit: [51]

In the District Court of the United States, District of Montana.

No. 37—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the plaintiff in the above-entitled cause and files the following assignment of errors, upon which it will rely upon the prosecution of the appeal of the above-entitled cause from the decree made by this Honorable Court on the 21st day of November, 1918:

1. That the United States District Court for the District of Montana, erred in failing to hold that the order issued by the Acting Commissioner of the General Land Office on the 29th day of January, 1904, by direction and authority of the President of the United States and the Secretary of the Interior, temporarily withdrawing from sale, entry or other disposal, excepting under the mineral laws, a body of land in Montana, comprising the lands in controversy in this action, pending determination as to the

desirability of including them within an addition to the Gallatin Forest Reserve theretofore created, was a valid withdrawal of vacant, unappropriated public lands for forest purposes, and that the lands in controversy in this action were not subject, at the commencement of this action, to selection as indemnity lands under the Act of Congress of July 2, 1864.

2. The Court erred in failing to hold that the Presidential Proclamation of March 7, 1906, was a valid reservation of the lands as a part of the Gallatin Forest Reserve.

3. The Court erred in failing to hold that at all times since January 29, 1904, the said lands have been reserved from the public domain for forestry purposes. [52]

4. The Court erred in failing to hold that the Commissioner of the General Land Office acted by mistake, error of law, and without authority of law in issuing the patent to the defendant for the lands on June 6, 1909, while the temporary withdrawal of January 29, 1904, and the Presidential Proclamation of March 7, 1908, reserving the lands for forestry purposes were outstanding.

5. The Court erred in failing to hold that the patent issued to the defendant by the Commissioner of the General Land Office on June 16, 1909, should be canceled.

6. The Court erred in failing to hold that the defendant acquired no title to indemnity lands under the Act of July 8, 1864 (13 Stat. 365), prior to the actual making of an indemnity selection.

7. The Court erred in failing to hold that the

right of the defendant to make a selection of indemnity lands depended upon the statute of the indemnity lands at the time of actual selection.

8. The Court erred in failing to hold that the defendant could not file an indemnity selection list upon these lands while the lands were unsurveyed.

9. The Court erred in failing to hold that the lands were not surveyed until April 5, 1906.

10. The Court erred in failing to hold that the lands, being in the indemnity strip under the Act of July 2, 1864 (13 Stat. 365), were, *at* all times prior to the filing of an indemnity selection list by the defendant, the absolute property of the United States and subject to disposition at its pleasure.

11. The Court erred in failing to hold that an indemnity selection list, unsupported by specific assignments of losses of lands in the primary limits under the Act of July 2, 1864 (13 Stat. 365), as required by the regulations of the Secretary of the Interior, was void. [53]

12. The Court erred in failing to hold that the defendant did not, at any time prior to the temporary withdrawal of January 29, 1904, file an indemnity list, supported by specific assignments of lands lost in the primary grant, for the lands in controversy.

13. The Court erred in failing to hold that, the lands having been withdrawn for forestry purposes on January 29, 1904, and prior to survey and prior to selection by the Railway Company, the lands were reserved lands and not subject to selection by the defendant on April 5, 1906, the date on which the company filed its indemnity selection list No. 120 in the

Bozeman, Montana, Land District.

14. The Court erred in holding that it had been ascertained by the Interior Department, prior to the temporary withdrawal of January 29, 1904, that the defendant would have received 4,086,000 acres less than it was entitled to and less than was granted to it by Congress, even though it had obtained all lands within the indemnity belt of the defendant's land grant, including the lands involved herein, and that this deficiency exists now.

15. The Court erred in holding that on January 29, 1904, or prior thereto, the Commissioner of the General Land Office, or any other officer of the United States, ascertained that there was a deficiency of 4,086,000 acres, or any deficiency, in the defendant's land grant.

16. The Court erred in failing to hold that the agreed statement of facts fails to show that any deficiency in the defendant's grant which may have existed on May 26, 1906, was not made up in full by the plaintiff to the defendant at the time of the filing of this action.

17. The Court erred in failing to hold that the agreed statement of facts does not show the quantity of the purported deficiency at the time of the temporary withdrawal of January 29, 1904. [54]

18. The Court erred in failing to consider the selective provisions of the Acts of July 1, 1908 (30 Stat. 597, 620), March 2 (31 Stat. 950), and May 17, 1906 (34 Stat. 197).

19. The Court erred in failing to hold that the agreed statement of facts does not show that on

January 29, 1904, there was any deficiency of lands under the defendant's land grant from Congress.

20. The Court erred in failing to hold that the agreed statement of facts was insufficient to justify the conclusion that on January 29, 1904, or at any time thereafter, the Railway Company has not received all lands to which it is entitled from the plaintiff.

21. The Court erred in failing to hold that the Act of July 2, 1864 (13 Stat. 378), did not grant to the defendant or its predecessor a definite quantity of land.

22. The Court erred in holding that the United States has not given to the defendant all of the land promised.

23. The Court erred in holding that the United States has not performed its agreement.

24. The Court erred in holding that the United States has deprived the defendant of over 4,086,000 acres of land.

25. The Court erred in holding that the defendant's right to indemnity and to select is a substantial vested right, prior to its exercise in the manner prescribed by the Statutes and the Regulations of the Secretary of the Interior, of which it cannot be deprived.

26. The Court erred in holding that in course of time the defendant's losses in its primary limits have increased and indemnity lands decreased so that the former exceeds the latter.

27. The Court erred in holding that when the lands in the indemnity strips were exceeded by the

defendant's losses that defendant's title to all indemnity lands attached and vested without selection. [55]

28. The Court erred in holding that the defendant is entitled to all indemnity lands that had neither power to choose nor duty to select.

29. The Court erred in holding that the rule of active selection of indemnity lands no longer applied.

30. The Court erred in failng to hold that until there was a selection by the Railway Company the lands were open to reservation or disposal by the United States.

31. The Court erred in failing to hold that the withdrawal of the land for forestry purposes was a disposition of the land incompatible with any right of the Railway Company and a disposal of the same defeating the provisions of the grant to the Railway Company.

32. The Court erred in failing to hold that the United States could reserve for public purposes, and against the grant to the Railway Company, lands of a character and status similar to lands which the United States could give away to settlers, against the grant to the Railway Company.

33. The Court erred in holding that the United States has not acted in good faith.

34. The Court erred in failing to hold that the lands heretofore received by the defendant and its predecessor under the Act of July 2, 1864 (13 Stat. 365), and the resolution of May 31, 1870 (16 Stat. 378), and Acts of Congress supplemental thereto, have not exceeded in value the lands granted to the

defendants and its predecessor under the Act of July 2, 1864 (13 Stat. 365), and the resolution of May 31, 1870 (16 Stat. 378).

35. The Court erred in holding that the United States has repudiated its contract.

36. The Court erred in finding the agreed statement of facts was insufficient to sustain the allegations of the bill of complaint herein.

37. The Court erred in rendering the decree herein in favor [56] of the defendant and against the complainant.

38. The Court erred in entering a decree herein in favor of the defendant and against the complainant, dismissing the complainant's bill of complaint.

WHEREFORE, the said complainant, the United States of America, prays that the said decree of the said District Court for the District of Montana, rendered and entered in the above-entitled cause, be reversed.

EDWARD C. DAY,
United States Attorney, for the District of Montana,
Attorney for Plaintiff and Appellant.

Filed January 31, 1919. C. R. Garlow, Clerk.
[57]

Thereafter, on Feb. 5, 1919, praecipe for transcript was duly filed herein, in the words and figures following, to wit: [58]

In the District Court of the United States, District of Montana.

No. 57—IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To Charles R. Garlow, Clerk of the Above-entitled Court:

In the preparation of the record on appeal in the above-entitled cause, you will incorporate into the transcript the following papers and documents, to wit:

1. The bill of complaint.
2. The defendant's answer.
3. The agreed statement of facts.
4. The memorandum opinion of the Court.
5. The decree.
6. The petition on appeal.
7. The order allowing appeal.
8. The citation.
9. The assignment of errors.
10. A copy of this praecipe.

EDWARD C. DAY,

United States Attorney, District of Montana.

Service of the foregoing praecipe and receipt of copy thereof acknowledged this 3d day of February, 1919.

GUNN & RASCH,
Attorneys for Defendant.

Filed Feb. 5, 1919. C. R. Garlow, Clerk. [59]

Certificate of Clerk United States District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 59 pages, numbered consecutively from 1 to 59, inclusive, is a full, true and correct transcript of the record of all proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by appellant's praecipe, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Twenty-two and 10/100 Dollars and have been made a charge against appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of February, A. D. 1919.

[Seal] C. R. GARLOW,
Clerk. [60]

[Endorsed]: No. 3305. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 24, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed transcript of record. Filed April 1, 1919. F. D. Monckton, Clerk.

57 **United States Circuit Court of Appeals for the Ninth Circuit.**

THE UNITED STATES OF AMERICA, appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a corporation, appellee. } No. 3305.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

58 At a stated term, to wit, the October term, A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Friday, the sixteenth day of May, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable Erskine M. Ross, Circuit Judge, presiding; Honorable William W. Morrow, Circuit Judge; Honorable William H. Hunt, Circuit Judge.

THE UNITED STATES OF AMERICA, appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a corporation, appellee. } No. 3305.

Order of submission.

Ordered appeal in the above-entitled cause argued by Messrs. D. F. McGowan, Assistant to the Solicitor, U. S. Department of Agriculture, Mr. E. C. Day, United States attorney, counsel for the appellant, and by Mr. M. S. Guinn, counsel for the appellee, and submitted to the court for consideration and decision.

59 At a stated term, to wit, the October term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable William W. Morrow, Circuit Judge, presiding; Honorable William H. Hunt, Circuit Judge.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, appellee. } No. 3305.

Order directing filing of opinion and filing and recording of decree.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the cause

was heard, ordered that the typewritten opinion this day rendered by this court in the above entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with said opinion.

60 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, appellee. } No. 3305.

Upon appeal from the United States District Court for the District of Montana.

Opinion U. S. Circuit Court of Appeals.

Before Ross, Morrow, and Hunt, Circuit Judges.

This suit was brought by the Government to procure the cancellation of a patent theretofore issued to the defendant to the suit for 5,681.76 acres of land situate in Gallatin County, Montana, resulting in a dismissal of the bill, from which judgment the present appeal was taken.

The case was tried and submitted to the court below upon an agreed statement of fact, which is as follows:

"1. The lands involved in this suit are nonmineral lands situated in the Bozeman land district in the State of Montana and within 50 miles, and more than 40 miles, of the line of railway constructed by the predecessor of the defendant under the act of July 2, 1864 (13 Stat., 365), and lie opposite that portion of the line of road
61 which was definitely located July 6, 1882.

2. January 29, 1904, under the direction and authority of the Secretary of the Interior and the President of the United States, the Commissioner of the General Land Office issued an order temporarily withdrawing from entry, sale and other forms of disposal, excepting under the mineral land laws of the United States, a certain area within whose exterior boundaries the tracts in controversy are situated, and this order of withdrawal was duly transmitted to and received by the register and receiver of the local land district in which said lands are situated. This withdrawal was made pending determination as to the desirability of including the lands so withdrawn within the Gallatin Forest Reservation, and by proclamation of March 7, 1908, the President of the United States included the area so withdrawn, which embraced in its exterior limits the lands involved in this controversy, within the said Gallatin Forest Reserve. The name of this forest reserve was changed by Executive order of July 1, 1908, to the Gallatin National Forest, within whose boundaries the said lands have ever since been included.

3. At the time that the order of withdrawal above mentioned was issued in 1904, the lands in controversy had not been officially surveyed, and they were not so surveyed until April 5, 1905, on which date the defendant filed in the local land office at Bozeman, Montana, its indemnity selection list No. 120, whereby it applied to select the lands involved in this suit in lieu of mineral lands within the place or granted limits of its grant, on account of which the defendant was entitled to make indemnity selection of lands subject to such selection; and the lands in controversy were subject to such selection unless the order of the Commissioner of the General Land Office issued January 29, 1904, pursuant to the direction and authority of the Secretary of the Interior and the President of the United States, as heretofore stated, was sufficient, under the law, to withdraw said lands from such selection.

62 4. The list of selections so filed by the defendant in the local land office at Bozeman, Montana, was forwarded to the Commissioner of the General Land Office at Washington, D. C., by the register of the local office at Bozeman on April 7, 1905. The letter forwarding the list contained the following statement:

"We doubt very much whether we should have allowed this list to become of record, for the reason that it is within the limits of the proposed addition to the Gallatin Forest Reserve, but thought best to leave it to your office for action, inasmuch as you could order the list cancelled if you desired to do so."

On examination in the General Land Office of the original list of selections so filed by the defendant, the examiner noted opposite the several tracts selected the following: "Addition to Gallatin Forest, Jan. 29, 1904 (reserve)."

5. The original list of selections embracing these lands was not approved by the Commissioner of the General Land Office or the Secretary of the Interior, nor was it the practice to approve original lists, but following the customary procedure the lands described therein were included within a further list prepared in the General Land Office designated as a clear list, which was submitted to the Secretary of the Interior for his approval, and the clear list so submitted to the Secretary of the Interior for his approval bore the following certificate from the examiner, the chief of the railroad division, and the Commissioner of the General Land Office.

MAY 27, 1909.

"It is hereby certified that the foregoing list has been examined in connection with the plats and records of this office, and the tracts therein selected found to be vacant and unappropriated lands falling within the indemnity limits of the grant to aid in the construction of the Northern Pacific Railroad (now Railway), and appear to be subject to approval and patent under the grant, having been classified and approved as non-mineral lands, while the tracts therein 63 designated as bases for said selection were found to have been lost to said grant and not heretofore used as bases for any approved selections.

It is further certified that the foregoing lands have been examined in the field by a special agent of this office who has reported the same to be non-mineral lands and recommends that the land be patented to the company.

Now, therefore, as it has been found on a careful examination in connection with the authenticated map on file in the General Land Office of the survey of the Northern Pacific Railroad route, that the foregoing lands fall within the fifty miles lateral limits of said route and that the said lands, so far as the returns to the General Land Office show, are free from conflict, it is hereby recommended that the described tracts, covering seven thousand, forty-nine acres and sixty hundredths of an acre, be approved and carried into patent as lands falling within the grant by the acts aforesaid, and inuring to the said Northern Pacific Railway Company as successor in interest to the Northern Pacific Railroad Company."

Neither the clear list so submitted to the Secretary of the Interior nor any of the certificates, or statements appearing thereon, showed that the lands in controversy had been withdrawn for national forest purposes; nor was any mention made thereof in the letter of transmittal written by the Commissioner of the General Land Office June 16, 1909, submitting the clear list to the Secretary of the Interior for his approval.

6. The clear list so submitted was approved by the Secretary of the Interior June 16, 1909, and thereafter a patent was issued for said lands, to the defendant, on June 24, 1909.

7. On November 6, 1914, the Acting Assistant Commissioner of the General Land Office addressed a letter to Washington counsel for defendant, in reference to the lands in controversy, and in that letter it was stated that as the tracts in question were selected subsequent to the order of withdrawal, the selection thereof was inad-
64 vertently allowed and the patenting of the tracts was erroneous, in view of which a demand was made upon the defendant railroad company to reconvey the tracts in question to the United States.

8. Since long prior to the year 1904 the regulations of the Department of the Interior respecting selections of land in satisfaction of losses within the granted limits of railroad land grants have required that such selection lists shall be filed in the local land offices in which the lands selected are respectively located, and under such regulations such indemnity selections may not be made until the lands selected have been surveyed and the plats thereof officially filed in the local land offices and the lands declared to be open to entry under the public-land laws.

9. Prior to the year 1904 the defendant attempted to select public lands while they remained unsurveyed, as indemnity for loss of lands in its granted limits, and contended that it had a right to make such selections. The Secretary of the Interior, however, has uniformly refused to recognize all such lists so filed for unsurveyed

lands and has rejected them upon the ground that the selected lands has not been surveyed.

10. The defendant has applied to select all the unsurveyed odd-numbered sections of land within the indemnity limits of its grant, but in so doing did not assign specific losses of lands in the granted limits as bases for the proposed selections, and such proffer of selection has not been accepted by the Secretary of the Interior; and the defendant and its predecessor, the Northern Pacific Railroad Company, has filed selections of all surveyed public lands in odd-numbered sections within the indemnity belts of its grant which were subject to selection under the regulations of the land department.

11. By the act of March 3, 1887 (24 Stat., 556), the Secretary of the Interior was directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

65 Shortly after the passage of this act the Commissioner of the General Land Office prepared a statement in adjustment of the Northern Pacific land grant, which represented what was styled a deficiency in said grant. This statement was revised in the year 1904 and, in accordance with the specific direction of the Secretary of the Interior, was forwarded to him by the Commissioner of the General Land Office with the latter's letter of May 26, 1906. This statement likewise showed what the commissioner represented as a deficiency in the grant of 4,092,472.99 acres.

In reaching this result the commissioner estimated the area of the grant to be the aggregate area of all odd-numbered sections lying within 20 miles of the line of railroad as definitely located in the States and within 40 miles of the said road as definitely located in the territories through which the said railroad extended; and, taking that as a basis, found that the sum total of acres granted exceeded by the number of acres above stated the sum total of acres that had been previously patented to or selected by the defendant plus all other lands within the primary and all indemnity limits that were regarded as subject to patenting under the grant.

The plaintiff admits that when the withdrawal order of January 29, 1904, was issued the lands patented to the defendants or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the primary or place limits, not patented, but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains; but the plaintiff does not admit that the correct measure of the grant is the aggregate area of all odd-numbered sections within the primary or place limits, or that any definite quantity of land was granted and

guaranteed to the defendant by any of the acts of Congress making grants of land to the defendant or its predecessor or predecessors in interest.

66 12. No map showing the definite location or general route of the railroad authorized by the act of 1864 was filed in the Interior Department until August 13, 1870, when a map was filed indicating the general route from the mouth of the Montreal River in Wisconsin to the mouth of the Walla Walla River in the then Territory of Washington. Thereafter maps of general route and definite location showing the location of various sections of the road were filed from time to time until November, 1884; and between the date of the grant in 1864 and the definite location of the various sections of the road the United States disposed of more than four million two hundred thousand acres of odd-numbered sections falling within the primary or granted limits of the road as finally and definitely located. The construction of the entire road was not completed prior to the year 1887.

13. The line of railroad, to aid in whose construction the land grant in question was made, extends from Lake Superior in Wisconsin to Tacoma and Portland in the States of Washington and Oregon, and runs into or through the following States: Minnesota, Wisconsin, North Dakota, Montana, Idaho, Washington, and Oregon. The population of these States in 1860, 1870, and 1880, as shown by the census reports for those years, was as follows:

State or Territory.	Population.		
	1860	1870	1880
Idaho	(a)	14,999	32,610
Minnesota	172,023	439,706	780,733
Montana	(b)	20,595	33,159
North Dakota	(c)	2,405	36,909
Oregon	52,465	90,923	174,768
Wisconsin	775,881	1,054,670	1,315,497
Washington	11,594	23,955	75,116

a Organized as a Territory March 3, 1863.
b Organized as a Territory May 26, 1864.
c Dakota organized as a Territory March 2, 1861.

14. Under the acts of July 1, 1898 (30 Stat., 597, 620), March 2, 1899 (31 Stat., 950), and May 17, 1906 (34 Stat., 197), the
67 defendant has selected in excess of 20,000 acres of lands in the State of Oregon, outside of the limits of its grant but within the indemnity limits of the grant made by Congress under the act of 1866, to aid in the construction of a railroad from Portland in Oregon to the southern boundary of the State. At the time of their selection by the defendant these lands were unsurveyed, and for that reason their selection by the Oregon and California Railroad Company, the beneficiary of the grant made by the act of 1866, would not have been allowed under the regulations of the Interior Department, notwithstanding the losses of lands within the

place or granted limits of the Oregon and California Railroad grant exceeded the total area of the odd-numbered sections within the indemnity limits of that grant.

This stipulation is not intended to preclude the court from taking cognizance of any matters not mentioned herein of which courts ordinarily take judicial notice.

Ross, Circuit Judge, after stating the case:

In the case of the United States v. Stanford, 69 Fed. 25, 38, in speaking of grants made by Congress in aid of the building of the transcontinental railroads which by reason of the circumstances under which they were undertaken and constructed became national in character, the court said:

"The terms and conditions of those grants are to be ascertained by a resort to the statute. Having been duly accepted by the railroad companies in question, they constitute the contract between the respective parties, from which the companies can not depart, and which the Government can not change or alter, except in the mode reserved to it by law. If, upon so elementary a proposition, authority is needed, it may be found in the decision in the Sinking Fund Cases, 99 U. S. 718, 719, and in Union Pac. R. Co. *v.* U. S., 104 U. S. 662." That decision was rendered January 29, 1895, and was affirmed by the Supreme Court, 161 U. S. 412.

The same contractual relations that arose between the Government and the grantee companies was subsequently declared in numerous decisions of the Supreme Court. It is enough to refer on that point to the late case of Burke v. Southern Pacific Railroad Company, 234 U. S. 669, where, at page 679, the court said:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct, and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands lying within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into the contractual relations that the terms of the proposal became obligatory on both. Menatti v. Dillon, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to per-

formance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a mere gift."

The grant under which the Northern Pacific Railroad Company, predecessor in interest of the present appellee, constructed that road and earned its grant, was made by act of Congress of July 2,
69 1864 (13 Stat. 265), secs. 3, 4, and 6 of which are as follows:

"SEC. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further,
70 That all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road (and within fifty miles thereof), may be selected as above provided: And provided, further, That the word 'Mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

"SEC. 4. And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company, conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, That lands shall not be granted under the provisions of this act on account of any railroad or part thereof constructed at the date of the passage of this act."

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad: and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

By its subsequent act of May 31, 1870 (16 Stat. 378), Congress by joint resolution enlarged that grant, and also empowered the grantee to mortgage the property, the resolution being as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern

Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its
72 main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: Provided, That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of
73 said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: Provided further, That in the construction of the said railroad American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

"SEC. 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties."

It is well settled that granted lands, such as referred to in the sections above quoted, are those within the place limits. Hewitt v. Schultz, 180 U. S., 139, 146; United States v. Northern Pacific Railroad, 152 U. S., 284, 296; Northern Pacific Railroad v. Sanders, 166 U. S., 620, 634, 635; and United States v. Oregon & California Railroad, 176 U. S., 28, 42, and authorities there cited. And it being conceded by the counsel for the appellee herein that prior to the selection of any land within the indemnity limits of the grant under which the appellee claims, in lieu of losses within its primary limits, all lands within such indemnity limits were and are open to all persons claiming under the general land laws prior to selection by the railroad company of such indemnity lands, it becomes unnecessary to cite the very numerous decisions of both the Supreme Court and the subordinate courts to that effect.

The real question here is, as we think, whether a court of equity should sustain the Government in its attempt to appropriate to its own purposes, to wit, for a public park, land that by its solemn contract it agreed the Northern Pacific Railroad Company should receive for completing its road, which it is conceded it did complete in performance of its part of the agreement.

It appears from the stipulation of the parties that the lands in controversy are nonmineral and situated in the Bozeman land
4 district in the State of Montana, and within fifty miles of and more than forty miles from the line of the appellee's railway, and opposite that portion thereof which was definitely located July 6, 1882; that January 29, 1904, under the authority and by the direction of the President and the Secretary of the Interior, the Commissioner of the General Land Office temporarily withdrew from entry, sale, and other forms of disposal, excepting under the mineral-land laws, a certain area within the exterior boundaries of which the lands in controversy are situated, which order of withdrawal was duly transmitted to and received by the register and receiver of the local land district in which the lands are situated; that such withdrawal was made pending determination as to the desirability of including the lands so withdrawn within Gallatin Forest Reservation, and that by proclamation issued March 1908, the President included the said area so withdrawn within said reservation, the name of which was subsequently changed by executive order of date July 1, 1908. It is further stipulated that the time the said order of withdrawal was made the lands in controversy had not been officially surveyed and were not so surveyed until April 5, 1905, on which date the appellee filed in the local land office at Bozeman its indemnity selection list No. 120, whereby it applied to select the lands involved in this suit in lieu mineral lands within the place limits of its grant, and it is conceded that in pursuance of such selection the patent sought by this

suit to be cancelled was issued, the Government insisting that in doing so the Land Department overlooked the said withdrawal order of January 29, 1904. It is further agreed by the respective parties that the appellee was entitled to make such indemnity selection, unless the said order of withdrawal was sufficient under the law to withdraw the said indemnity lands from such selection.

The case of Hewitt v. Schultz, supra, among others that might readily be cited, clearly shows that for many years, and until the decision of Secretary Vilas in the case of Miller v. Northern Pacific Railroad Company, 7 L. D. 100, in 1887, it was the practice
75 of the Department of the Interior to withdraw from sale or entry under the general land laws such indemnity lands on the filing by the railroad company of its map showing the location of its general route. That decision of the Secretary, which in effect held that the grant to the Northern Pacific Railroad Company forbade the Land Department to withdraw prior to survey from the operation of the pre-emption and homestead laws any lands within the indemnity limits of the grant, was approved by the Supreme Court in the Hewitt-Schultz case, Justices Brewer and Shiras dissenting, the court, near the conclusion of its opinion (pp. 156-7) saying:

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress: for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas, and Smith, and upon which the Land Department has acted since 1888.
76 'It is the settled doctrine of this court,' as was said in United States v. Alabama Great Southern Railroad, 142 U. S. 615, 621, 'that, in case of ambiguity, the judicial department will lean

in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864."

The law has, therefore, long been thoroughly settled not only that the Northern Pacific Railroad Company acquired no right to any specific tract of land within the indemnity limits of its grant prior to the survey thereof and its selection by the company, but that neither the Secretary of the Interior, the Commissioner of the General Land Office, nor any other officer of the Government was authorized to withdraw for the benefit of the railroad company any of such indemnity lands prior to their survey from settlement or entry under the general land laws. But that, in our opinion, is a wholly different thing from holding or in any way implying that any officer of the Government was authorized to withdraw any of such indemnity lands for the purposes for the Government itself, in violation of the solemn contract made by Congress in its acts above referred to, which as we have before observed is the real question in this case.

By act of Congress of March 3, 1887 (24 Stat. 556), the Secretary of the Interior was directed to immediately adjust, in accordance with the decisions of the Supreme court, each of the railroad land grants made by Congress to aid in the construction of railroads and theretofore unadjusted. That there was found such a deficiency of granted lands within the primary limits of the grant in ques-
77 tion as entitled the railroad company to look to the indemnity lands in lieu thereof, we think clearly appears not only from the agreed statements of facts upon which the case was tried, but from the fact of the issuance by the Land Department of the patent sought by this suit to be canceled, not by reason of the fact that it was issued for indemnity land in lieu of land lost to the railroad company within the primary limits of its grant, but because of the withdrawal order of January 29, 1904.

In the case of St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 19, the court very carefully considered the act of July 2, 1864, and concluded its unanimous opinion in these words:

"As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was,

therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

In Wisconsin Central Railroad Company v. Forsythe, 159 U. S. 46, 60, the same court said:

"When Congress makes a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land, and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that if possible the beneficiary shall receive those particular sections. So far as railroads are concerned, it is the thought not merely that the general welfare will be subserved by the construction of the road along the lines indicated, but further, that such grant shall not be attended with any pecuniary loss to the United States; for the universal rule is to double the price of even sections within the granted limits. The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus
78 by their settlement and improvement increase the value of even sections adjoining and so justify the added price. To fully realize this expected benefit it is essential that the lands taken by the company shall be as near to the line of the road as possible; and so, while selection of remote lands is permitted, it is only when and because there is a necessity of such selection to make good the amount of the grant. Obviously, therefore, an act must be construed to realize, so far as is possible, this intent and to accomplish the desired result."

In Southern Pacific Railroad Company v. Bell, 183 U. S., 675, 689, the court said:

"Now, as already observed, there is a clear distinction in section 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. It is true that, prior to this selection being made, many of these indemnity lands may be taken up, and an insufficient amount left for the railroad (and we do not deny the force of the dissenting opinion in Hewitt v. Schultz in that connection), but we think this possibility serves rather as a basis for a further action by Congress, such as was made in the Northern Pacific case by the joint resolution of May 31, 1870 (16 Stat., 378), than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require."

In Oregon & California Railroad Company v. United States, 189 U. S., 103, 115, the court further observed:

"It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition prior to definite location by sale and otherwise of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect of place limits."

And in Humbird v. Avery, 195 U. S., 480, 507, 508, 509, the court, after referring to its preceding decision in 133 U. S., 496, to
79 the effect that the indemnity lands remained unaffected by the grant until selection, and that "Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts," said:

"Now, the lands here in dispute and claimed by the plaintiffs as grantees of the Northern Pacific Railway Company (the alleged successor in interest of the Northern Pacific Railroad Company), are lands admittedly within indemnity, as distinguished from granted or place, limits. The mere filing of lists of selections, after the acceptance of the map of definite location of the railroad line between Duluth and Ashland, gave the company no such title as could be enforced by the courts in a suit between private parties. It is true the Government was under a promise to give the railroad company lands in the indemnity limits to supply losses in place limits. But, as adjudged in the above cases, that promise passed no title. The promise will no doubt be fulfilled by the Government in due time and in its own way. The selections not having been approved by the Secretary, the title remains in the Government."

That promise of the Government of indemnity lands in lieu of what might be lost in the place limits was an essential part of the contract between the Government and the Northern Pacific Railroad Company for the building of the road it did build, the compliance with which contract on its part clearly precludes, in our opinion, the Government from subsequently taking such lands for other purposes of its own.

The judgment is affirmed.

(Endorsed:) Opinion. Filed April 5, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

80 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, APPELLEE. } No. 3305. Decree.

Appeal from the District Court of the United States for the District of Montana.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Montana and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Decree. Filed and entered April 5, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

81 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT.
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, APPELLEE.

Petition for appeal.

To the honorable, the judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

The above named appellant, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 5th day of April, 1920, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed; that citation be issued as provided by law, and that a transcript of the record of proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, under the rules of such court in such cases made and provided.

EDWARD C. DAY,
United States Attorney, District of Montana,
Attorney for Appellant.

Dated San Francisco, Cal.,
April 22, 1920.

Let the appeal prayed for in the foregoing petition be allowed.

WM. H. HUNT,
U. S. Circuit Judge.

(Endorsed:) Petition for and order allowing appeal to Supreme Court, U. S. Filed April 22, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

82 **United States Circuit Court of Appeals for the Ninth Circuit.**

UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, appellee.

Assignment of errors.

Comes now the appellant in the above-entitled cause and files the following assignment of errors, upon which it will rely upon the prosecution of its appeal in the above-entitled cause from the decree made by this honorable court on the 5th day of April, 1920:

1. That the Circuit Court of Appeals for the Ninth Circuit erred in holding that the act of Congress approved July 2, 1864 (13 Stat. 365), granting lands to the Northern Pacific Railway Company in aid of the construction of its road, as enlarged by the act of May 31, 1870 (16 Stat. 378), constituted an agreement on the part of the United States, in consideration of the construction of the road, to convey to the railroad company the lands within the indemnity limits in lieu of lands which might be lost in the place limits, which agreement when performed by the railroad company by the completion of the road precluded the United States from subsequently withdrawing for its own purposes the lands lying within the indemnity limits, even though such lands had not been surveyed or selected by the company.

2. The court erred in affirming the judgment of the District Court of the United States for the District of Montana, from which said appeal was taken.

83 Wherefore the said appellant, the United States of America, prays that said decree of the United States Circuit Court of Appeals for the Ninth Circuit rendered and entered in the above-entitled cause be reversed.

EDWARD C. DAY,
United States Attorney District of Montana,
Attorney for Appellant.

(Endorsed:) Assignment of errors on appeal to Supreme Court U. S. Filed April 22, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

84 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, appellee. } No. 3305.

Certificate of clerk, U. S. Circuit Court of Appeals, to transcript of record upon appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-three (83) pages, numbered from and including 1 to and including 83, to be a full, true, and correct copy of the record under rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled cause, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 29th day of April, A. D. 1920.

[SEAL.] F. D. MONCKTON, *Clerk*,
By PAUL P. O'BRIEN,
Deputy Clerk.

85 In the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, appellee. } No. 3305.

Citation on appeal, to Supreme Court, U. S.

UNITED STATES OF AMERICA, *ss:*

To the above named appellant, Northern Pacific Railway Company, a corporation, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be held in the city of Washington, in the District of Columbia, on the 21st day of June, 1920, pursuant to an order allowing the appeal filed and entered in the office of the clerk of the United States Circuit Court of Appeals for

the Ninth Circuit, from the final decree entered on the 5th day of April, 1920, in that certain suit numbered 3305, wherein the United States of America was plaintiff and appellant and you were defendant and appellee, to show cause, if any there be, why the judgment rendered against said appellant, as in said order allowing the appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable William H. Hunt, Judge of the Circuit Court of Appeals for the Ninth Circuit, this 22d day of April, 1920.

WM. H. HUNT,
U. S. Circuit Judge.

86 Service of the within citation on appeal admitted and receipt of copy thereof acknowledged this 26th day of April, 1920.

GUNN AND RASCH,
Attorneys for Appellee.

(Endorsed:) No. 3305. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, appellant, vs. Northern Pacific Railway Company, a corporation, appellee. Citation. On appeal to Supreme Court U. S. Filed Apr. 29, 1920. F. D. Monckton, clerk. By Paul P. O'Brien, deputy clerk.

87 In the Supreme Court of the United States.

October term, 1919.

UNITED STATES OF AMERICA, APPELLANT,
v.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION. } No. 909.

Appeal from the Circuit Court of Appeals for the Ninth Circuit.

Stipulation.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause, by their respective attorneys, that the affidavit of value of the matter in controversy therein, executed May 12, 1920, by R. H. Rutledge, may be filed with and made a part of the record in this case in the Supreme Court of the United States.

Dated this 22nd day of May, 1920.

ALEX. C. KING,
Solicitor General, Attorney for Appellant.
ALEX. BRITTON,
Attorney for Appellee.

88 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, respondent. } #909.

Appealed from the Circuit Court of Appeals for the Ninth Circuit.

STATE OF MONTANA,
County of Missoula, ss:

R. H. Rutledge, being first duly sworn, deposes and says: I am a citizen and resident of the State of Montana and county of Missoula, and am at the present time connected with the Forestry Bureau of the United States Department of Agriculture in the capacity of district forester; that I know the location of the lands in controversy in the above-entitled cause and am acquainted with the value thereof; that the tract of land embraced in the area sought to be withdrawn for forestry purposes embraces five thousand six hundred eighty-one and 76/100 (5,681.76) acres of land situated in Gallatin County, Montana, which said lands are chiefly valuable for the timber standing thereon; that said lands are worth to exceed the sum of one thousand dollars ($1,000), to wit, the sum of ten thousand dollars ($10,000), and that the value of the matter in controversy in the above-entitled cause exceeds the sum of one thousand dollars besides costs. Further deponent sayeth not.

R. H. RUTLEDGE.

Subscribed and sworn to before me this 12th day of May, 1920.

[SEAL.] P. J. O'BRIEN,
Notary Public in and for the State of Montana, residing at Missoula, Montana.

My commission expires April 5, 1922.

89 File No. 27664. Supreme Court U. S. October term, 1919. Term No. 909. The United States, appellant, *vs.* Northern Pacific Railway Co. Stipulation and addition to record. Filed May 24, 1920.

(Indorsement on cover:) File No. 27664. U. S. Circuit Court Appeals, 9th Circuit. Term No. 909. The United States of America, appellant, vs. Northern Pacific Railway Company. Filed May 7th, 1920. File No. 27664.

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[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, appellant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation.

No. 909.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellant, and moves the court to advance the above-entitled case to be heard at the next term of this court with *The Northern Pacific Railway Company, appellant*, v. *Franklin K. Lane, Secretary of the Interior* (*John Barton Payne, Secretary, etc.*, substituted), No. 35, October Term, 1919.

In case No. 35 the railway company brought suit in the Supreme Court of the District of Columbia to secure a mandatory injunction against the Secretary of the Interior to compel him to recall certain decisions rejecting an indemnity selection list filed by it and to recognize the asserted rights of the company

in and to the lands thus selected in lieu of lands lost in its place limits. The Secretary had rejected the selection because the lands listed therein were at the date of its filing embraced in a withdrawal for forestry purposes.

Case No. 909 is a suit in equity brought by the Government to cancel a patent issued to the railway company on an indemnity selection list, in so far as it included certain lands which were at the time of the filing of the selection temporarily withdrawn for forestry purposes and subsequently included in a national forest. The patent issued through mistake, the fact of the withdrawal of the lands being overlooked.

It will thus be seen that the same question is presented in both cases, namely, as to the right acquired by the filing of an indemnity selection with respect to land previously withdrawn for public purposes.

In view of the foregoing, it would seem advantageous to have the two cases heard together.

Appellee's counsel concur in this motion.

ALEX. C. KING,
Solicitor General.

MAY, 1920.

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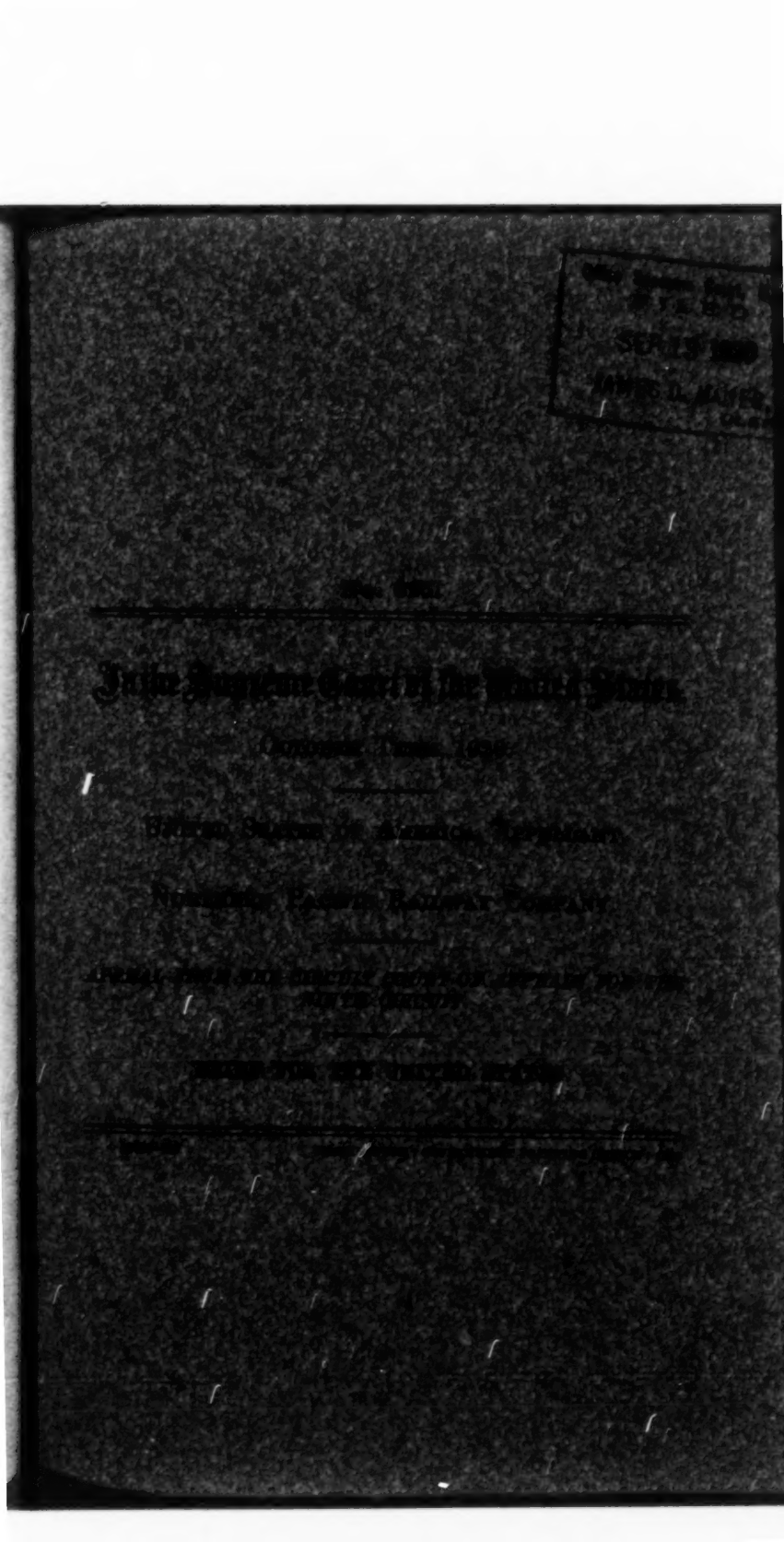

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

UNITED STATES OF AMERICA, APPELLANT,
v.
NORTHERN PACIFIC RAILWAY COMPANY. } No. 325.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The United States brought suit on June 5, 1915, in the United States District Court for the District of Montana, against the Northern Pacific Railway Company to cancel a patent issued to that company on June 24, 1909, for certain lands in the State of Montana embraced in an indemnity list filed by the company.

The railway company is the successor of the Northern Pacific Railroad Company, the beneficiary under the act of July 2, 1864, ch. 217, 13 Stat. 365, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by

the northern route." That act, like other railroad land grants, granted (sec. 3, p. 367) every odd-numbered section, not mineral, to the amount of twenty sections per mile, on each side of the road through the Territories and ten such sections on each side through the States. For such sections or parts thereof as, previous to the filing of the map of definite location, had been granted, sold, reserved, or otherwise disposed of, a privilege was given to select under the direction of the Secretary of the Interior other lands in odd sections not more than ten miles beyond the place lands.

By the resolution (67) of May 31, 1870, 16 Stat. 378, it was provided that if there were not enough lands to satisfy the grant, within the limits prescribed, lands within ten miles of those limits might be taken.

It appears that on April 5, 1905, the railway company filed in the local land office at Bozeman, Montana, an indemnity list for certain enumerated tracts of land situated within the indemnity limits, in lieu of lands lost to it in the place limits of its grant. R. 7.

The lands so selected had been on January 29, 1904, temporarily withdrawn pending determination as to the advisability of their inclusion in a national forest. Subsequently, on March 7, 1906, the President by proclamation of that date added said lands, then still temporarily withdrawn, to the Gallatin Forest Reserve, now the Gallatin National Forest. 34 Stat., pt. 3, p. 3193.

Overlooking the withdrawal of these lands as stated, and through inadvertence and mistake, the officers of the Land Department caused a patent to be issued for them. Upon discovery of the mistake, a formal demand was made by the General Land Office on the company for a reconveyance which was refused.

The theory of the bill was that the issuance of the patent was the result of inadvertence and mistake in that the fact was overlooked that the lands applied for had been withdrawn for inclusion in a national forest, *prior* to the date of the filing of the selection list.

The case was tried on an agreed statement of facts. R. 27–36. This, in addition to the facts heretofore stated, set forth that the lands involved had not been officially surveyed when the temporary withdrawal was made, and were not until April 5, 1905, on which date the selection list was filed by the company. It also appears that prior to 1904 the railway company had attempted to select unsurveyed lands but the Secretary of the Interior refused to permit that to be done; further, that "blánket selections" of all unsurveyed odd-numbered sections within the indemnity limits had been made without assigning specific losses within the place limits, but such selections had not been accepted by the Secretary.

It was also set forth that under the provision of the act of March 3, 1887, 24 Stat. 556, requiring the

Secretary of the Interior to adjust railroad grants, the Commissioner of the General Land Office had prepared a statement in adjustment of the Northern Pacific grant; this statement, revised in 1904, was forwarded to the Secretary of the Interior by the Commissioner May 26, 1906, and showed a deficiency in the grant of over four million acres.

The District Court entered a decree dismissing the Government's bill. R. 42; Opinion, R. 36–42.

Upon appeal to the Circuit Court of Appeals that decree was affirmed. R. 71–72; Opinion, R. 58–71; 264 Fed. 898.

The theory of the defense to the suit by the Government appears to be that, inasmuch as there was a deficiency in the grant, it was beyond the power of the President or the Land Department to withdraw any lands within indemnity limits for any purpose, apparently grounding this upon the proposition that for the Government to do so would constitute a breach of its covenant or contract with the railroad company, which had fully performed its part of the same by construction of the railroad.

The broad question thus presented is the right acquired by the company under the terms of the granting act and by virtue of its selection filing.

ASSIGNMENT OF ERRORS.

1. That the Circuit Court of Appeals for the Ninth Circuit erred in holding that the act of Congress approved July 2, 1864 (13 Stat. 365), granting lands to the Northern Pacific Rail-

way Company in aid of the construction of its road, as enlarged by the act of May 31, 1870 (16 Stat. 378), constituted an agreement on the part of the United States, in consideration of the construction of the road, to convey to the railroad company the lands within the indemnity limits in lieu of lands which might be lost in the place limits, which agreement, when performed by the railroad company by the completion of the road, precluded the United States from subsequently withdrawing for its own purposes the lands lying within the indemnity limits, even though such lands had not been surveyed or selected by the company.

2. The court erred in affirming the judgment of the District Court of the United States for the District of Montana, from which said appeal was taken. R. 73.

PROPOSITIONS.

1. No rights to lands within the indemnity limits attach until an application to select is filed.
2. As the lands involved were at the date of filing of the selection list already withdrawn for forestry purposes, they were not subject to selection.
3. There is no obligation upon the part of the United States to preserve lands within indemnity limits for the benefit of the company.

ARGUMENT.

I.

No rights to lands within the indemnity limits attach until an application to select is filed.

So well settled is that proposition that it seems hardly necessary to cite authority for it.

In *Ryan* v. *Railroad Company*, 99 U. S. 382, it was said (p. 386):

> With respect to the "lieu lands" as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.

This principle was reiterated in *St. Paul & Sioux City R. R. Co.* v. *Winona &c., R. R. Co.*, 112 U. S. 720, the opinion in which reviewed a number of the former adjudications on the point (p. 731); and still later it was again stated in *Oregon & California R. R. Co.* v. *United States*, No. 1, 189 U. S. 103, 112, 113, with a citation of authorities. At page 113 the court, in its opinion, said:

> Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction or with the approval of the Secretary.

To the same effect is the case of *Osborn* v. *Froyseth*, 216 U. S. 571, 577, 578.

In *United States* v. *Southern Pacific R. R. Co.*, 223 U. S. 565, it was said (pp. 570, 571):

> An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course, the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim. It seems to us, in short, that *Ryan* v. *Railroad Company, supra*, should be taken to establish a general principle and should not be limited to its special facts.

II.

As the lands involved were at the date of filing of the selection list already withdrawn for forestry purposes, they were not subject to selection.

There can be no question of the legality of these withdrawals. Even without statutory authority, the

President had the power to make withdrawals of this kind. *United States* v. *Midwest Oil Co.*, 236 U. S. 459. But specific authority to withdraw public lands for forestry purposes was conferred by section 24 of the act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103 (U. S. Comp. Stats. 1916, Ann., sec. 5121).

Nor is the validity or effectiveness of the withdrawal impaired because it was a temporary withdrawal. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 356.

But we understand that the contention of the railway company is not as to the validity of such withdrawals broadly but rather as to the effectiveness of them as against the rights of the company with respect to lands within the indemnity limits.

However, it is difficult to perceive any basis for that contention. As we have seen, *no rights* attach to lands within indemnity limits until a selection is filed. Now when the withdrawal was made no application to select had been filed, hence there were no rights taken away by or in conflict with the withdrawal. The company having acquired no rights could not be damaged by the withdrawal.

The withdrawal operated as a reservation of disposition by the Government of the lands covered thereby, except as to rights expressly saved or previously initiated. When the list was tendered the lands were not subject to disposition and the withdrawal barred acceptance of it.

III.

There is no obligation upon the part of the United States to preserve lands within indemnity limits for the benefit of the company.

We take it that the point most relied upon by the company is that there is a legal obligation resting upon the United States to maintain these indemnity lands intact, at least so far as appropriation by the United States is concerned, for the benefit of the company. This obligation is said to arise out of the granting act, and it is argued that as the company has fulfilled its part of the contract in building the railroad, it is incumbent upon the United States to fulfill its obligation by seeing that the company receives all the lands which it was intended to give it under the grant.

While the particular phase here presented has not before been urged in the courts, so far as we know, yet in principle the point was decided by this court in *Hewitt* v. *Schultz*, 180 U. S. 139.

That case arose over a controversy between a settler, Hewitt, and Schultz, a purchaser from the Northern Pacific Railroad Company which claimed the land under the same grant as the one involved in the case at bar. Hewitt had settled upon the land prior to the company's application to select. At the time of his settlement the land had been withdrawn under an order of the General Land Office which was promulgated in view of the filing by the railroad company of its map of definite location,

and for the purpose of preserving the lands within the indemnity limits for the company.

The court stated the controlling question in the case to be (p. 141):

> Whether it was competent for the Secretary of the Interior, upon receiving and approving the map of definite location of the road, to make the above order of withdrawal in respect of the odd-numbered sections of land within the *indemnity* limits.

In reaching the conclusion that such a withdrawal was unauthorized, the court discussed rather fully the provisions of the granting act and gave great weight to the holding of the Land Department upon the question. The departmental decisions in *Northern Pacific R. R. Co.* v. *Miller*, 7 L. D. 100, 120, and *Northern Pacific R. R. Co.* v. *Davis*, 19 L. D. 87, 90, were quoted, the former at considerable length. Pages 150–155. In the quotation from the departmental opinion the following occurs, which seems particularly in point here (pp. 152, 153):

> The consequence of this difference [between place and indemnity lands] is that until a valid selection by the grantee is made from the lands within the indemnity limits they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposition of the public lands. There is nothing to the line bounding the indemnity limits to distinguish lands within it from any other public lands; the only purpose of that being to place a boundary upon the

right of selection in the grantee to make good losses sustained within granted limits. This effect has been most explicitly declared by the Supreme Court in the case of *Kansas Pacific Railroad* v. *Atchison, Topeka and Santa Fe Railroad*, 112 U. S. 414, and in other cases. In that case the court said of an order of the Commissioner of the General Land Office similar to this, so far as applicable to indemnity limits: "The order of withdrawal of lands along the probable lines of the defendant's road made on the 9th of March, 1863, by the Commissioner of the General Land Office affected no rights which without it would have been acquired to the land, nor in any respect controlled the subsequent grant." It also said of the indemnity limits under discussion there: "For what was thus excepted from the granted limits other lands were to be selected from adjacent lands, *if any then remained, to which no other valid claim had originated*. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten-mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until such selection

> was made the title remained in the Government, subject to its disposal at its pleasure."

Now the contention of the railway company is in effect a reopening of the *Hewitt* case, but the Circuit Court of Appeals seemed to think that that case was easily distinguishable from the case before it, for in commenting on the former it said (R. 69; 264 Fed. 907):

> The law has, therefore, long been thoroughly settled not only that the Northern Pacific Railroad Company acquired no right to any specific tract of land within the indemnity limits of its grant prior to the survey thereof and its selection by the company, but that neither the Secretary of the Interior, the Commissioner of the General Land Office, nor any other officer of the Government was authorized to withdraw for the benefit of the railroad company any of such indemnity lands prior to their survey, from settlement or entry under the general land laws. But that, in our opinion, is a wholly different thing from holding or in any way implying that any officer of the Government was authorized to withdraw any of such indemnity lands for the purposes of the Government itself, in violation of the solemn contract made by Congress in its acts above referred to which, as we have before observed, is the real question in this case.

We believe that the court overlooked the fundamental consideration upon which the question in that case was determined.

The basic question presented in the *Hewitt* case was whether there was an obligation on the part of

the Government to preserve for the benefit of the railway company lands in the indemnity limits. If such an obligation rested upon the Government that would have imposed the duty of withdrawing those lands from appropriation by settlers and others. The court held, however, that the withdrawal of such lands from settlement was unauthorized. That holding was clearly bottomed on the conclusion that no obligation such as suggested was imposed upon the Government.

There is no sound basis for the distinction made by the Circuit Court of Appeals between the *Hewitt* case and the case at bar. If there was no obligation upon the Government to secure these lands from private appropriation, much less was there a duty on the part of the Government not to appropriate the lands for its own purposes in pursuance of an established national policy.

The entire contention of appellee in this regard ignores the vital point that the railway company secures no rights to lands within the indemnity limits until a filing is made. Until such a filing is made, there is less reason for saying that the Government cannot appropriate these lands for its own purposes than there is for saying that settlers cannot do so, and yet the right of settlers to acquire such lands at any time prior to the filing of the list is unquestionable.

Furthermore, it is important to note that in the grant of place lands the Government clearly indicated that until the rights of the company attached

by the definite location of the road it would have the right to reserve or dispose of these lands. A right to indemnity was provided for lands reserved or disposed of. It would be unreasonable to assert that although the Government could reserve lands within the place limits prior to the time when the company's rights attached, yet it could not reserve lands within the indemnity limits prior to the time when the company's rights thereto were initiated. In the case of place limits rights attached by the definite location of the road. With respect to indemnity limits similar rights attached by the filing of an application to select.

Certainly, if Congress had intended to impose a different obligation on the Government with respect to indemnity lands than it did in regard to place lands it would have manifested that intent by appropriate language in the Act.

The well-settled rule is that one may acquire rights against another claimant to public lands and yet not secure rights against the Government.

In the instant case the railway company would reverse this rule and would have the court declare that it might secure rights in public lands against the Government when it could not acquire them against an individual.

Neither is there anything in the granting act to warrant the assertion that Congress intended to guarantee any specific amount of land to the company. Congress clearly recognized that there would be losses in the place limits and therefore provided

for indemnity, but there was no promise that the indemnity would be sufficient or that all losses in the place limits would be compensated by the lands in the indemnity limits.

As was said in *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 512, "the Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

Now, there was a possibility that the grant to the company might not give an amount of land equal to odd-numbered sections primarily granted. The sections might be mineral in character, or otherwise disposed of previous to the time when the rights of the company vested. The lands in the indemnity belt might, before the company's rights attached, be otherwise disposed of. There was, then, a *possibility* that all the lands might be placed beyond the reach of the company. Suppose all the lands in the indemnity belt were found to be mineral, the company could not complain. It took the grant with that possibility, and the same thing is true as to other appropriation. In other words, the company accepted the grant subject to all express or implied conditions.

However, if the railway company feels that there is a *moral* obligation on the part of the Government to give it indemnity for all losses in the place limits, when the lands in the indemnity belt are not available

because of previous appropriation, its appeal should be made to Congress and not to the courts.

That this is a matter for Congress is indicated by what was said by this court in *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, at page 689:

> Now, as already observed, there is a clear distinction in section 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. It is true that, prior to this selection being made, many of these indemnity lands may be taken up and an insufficient amount left for the railroad (and we do not deny the force of the dissenting opinion in *Hewitt* v. *Shultz* in that connection), *but we think this possibility serves rather as a basis for a further action by Congress*, such as was made in the Northern Pacific case by the joint resolution of May 31, 1870 (16 Stat. 378), than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require. [Italics ours.]

And in *Humbird* v. *Avery*, 195 U. S. 480, 508, this court said:

> The promise will no doubt be fulfilled by the Government in due time and in its own way.

Grants of this character are construed strictly against the grantee, and in the absence of a clearly expressed purpose to preserve the lands within indemnity limits for the company no such purpose should be presumed.

We do not consider the action of the company in filing blanket selections without assigning definite losses, or in applying for all the lands within the indemnity limits, to have strengthened its position.

The requirement for approval of the selection lists by the Secretary of the Interior would be a vain thing if it was to be given to a list not supported by a definite showing of specific losses. The Land Department has required assignment of definite base. Circular of August 4, 1885, 4 L. D. 90; *St. Paul, M. & M. Ry. Co.* v. *Munz*, 17 L. D. 288. As to applications for unsurveyed lands, those were clearly unacceptable and could not properly be made until the lands were identified by survey. This has been the rule of the Land Department. 27 L. D. 122.

Stress is placed upon the fact that the Commissioner of the General Land Office has compiled statistics indicating that losses had accrued to the company to such an extent that all the then unappropriated lands within indemnity limits would not be sufficient to compensate the company for its place losses. We do not regard that as of material bearing upon the issues here. Furthermore, the fact is the compilation had never been formally approved by the Secretary.

This point was raised in *Hewitt* v. *Schultz*, *supra*, pp. 157, 158, but it was apparently not deemed to be of special moment.

The failure of the Government to have the lands sooner surveyed, the inference being that thereby

the company was prejudiced, is not material. The same point was considered in *Oregon & California Railroad Co.* v. *United States, No. 2*, 189 U. S. 116, and this court said (p. 118):

> The railroad company rests its claim to have a superior right to these lands on the ground in part of long delay by the Commissioner of the Land Office in having them surveyed, although it frequently requested the survey to be made. There is nothing of substance in this contention. The statute, it is true, required the lands to be surveyed with all "convenient speed." But the question as to the precise time the lands should be surveyed was exclusively for the Land Office to determine, and it was to be determined with reference to all the facts and circumstances connected with the surveying of the public lands under the direction of the Land Department. We can not say from the record that the Land Office, in the matter of the surveying of the particular lands here in dispute, did not act with convenient speed. Besides, the railroad company accepted the grant of Congress subject to the possibility of delay in the surveying, as well as to the power of the Land Office to determine when the lands should be surveyed. The action or nonaction of the Land Department in such a matter can not be controlled by the judiciary, unless perhaps in a case in which it appeared, beyond question, that its refusal to order the survey was merely arbitrary and without any real excuse.

In *United States* v. *Missouri, Kansas & Texas Railway Company*, 141 U. S. 358, speaking of acts of

Congress granting indemnity rights, the court said (p. 374):

> The words in the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, indicating the source from which indemnity lands were to be obtained, namely, "from the public lands of the United States nearest to sections above specified," can not well be held to mean the same thing as the words, in other acts, "from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections *designated by odd numbers.*" In one case the selection, for purposes of indemnity, may be from any of the public lands of the United States nearest to the tier of sections in the place limits; in the other, the selection is restricted to odd-numbered sections within the indemnity limits; *in neither case, however, could lands be selected that had been previously withdrawn by competent authority from location, sale, or entry,* or had been appropriated or sold by the United States, or to which preemption or homestead rights had attached. [Second italics ours.]

CONCLUSION.

It follows that the judgment of the Circuit Court of Appeals was erroneous and should be reversed.

Respectfully submitted.

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No. 325

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1920

UNITED STATES OF AMERICA, *Appellant*

v.

NORTHERN PACIFIC RAILWAY COMPANY

BRIEF FOR THE NORTHERN PACIFIC RAILWAY COMPANY

CHARLES W. BUNN
CHARLES DONNELLY

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STATEMENT.

In this case the Government asks the court to cancel a patent given to the Northern Pacific Railway Company, covering 5681.76 acres of land in Gallatin County, Montana, on the ground that the Railway Company has no right to it and that it was improvidently or inadvertently issued. The Railway Company insists that it has a right to it and that it should not be canceled. The United States District Court for the District of Montana, in which the suit was begun, sustained the contention of the Railway Company and dismissed

the bill (Tr. 36). The Circuit Court of Appeals for the Ninth Circuit affirmed unanimously the decree of dismissal (Tr. 58, 264 Fed. 898). There is no dispute as to the facts; so far as they are not known judicially, they have been stipulated. They may be summarized as follows:

1. July 2, 1864, Congress passed a law incorporating the Northern Pacific Railroad Company and making a grant of lands to it (13 Stat. 365). The only sections of this law which affect directly the questions here involved are sections 3, 4 and 6, reading as follows:

> "Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold,

granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, *and within fifty miles there-*

of,* may be selected as above provided: *And provided further*, That the word 'Mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said 'Northern Pacific Railroad.'"

"Sec. 4. *And be it further enacted*, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by

*The italicized words, "and within fifty miles thereof," do not appear in this section as it is printed in the Statutes at Large, but they are in the act as passed and approved, and as recorded in the State Department, 29 Op. A. G. 498, 41 L. D. 571. *Hessey v. N. P. Ry. Co.*, 43 L. D. 302.

said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: *Provided*, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also*, That lands shall not be granted under the provisions of this act on account of any railroad or part thereof constructed at the date of the passage of this act."

"Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption

rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended, to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

2. Under the act of incorporation the Railroad Company was without power to mortgage its property. May 31, 1870, Congress adopted a joint resolution (16 Stat. 378) conferring this power, making a further grant of lands, and providing for a second indemnity belt of the same width as that provided for by Section 3 of the original act. This joint resolution reads as follows:

> *"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and

effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any state or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus

and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided, further*, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

"Sec. 2. *And be it further resolved*, That Congress may at any time alter or amend

this joint resolution, having due regard to the rights of said company, and any other parties."

3. There is no uncertainty, at least in the present state of the decisions, as to what was granted by the foregoing statutes, or as to how the Railroad Company was to get the benefits of the grant. The language of Section 6 of the Act of 1864, quoted above, is clear. The President was to cause the lands to be surveyed for forty miles on both sides of the entire line of road *"as fast as might be required by the construction of said railroad"*; and Section 4 provided, with equal clearness, that whenever twenty-five consecutive miles of railroad were built to the satisfaction of the Government, patents should be issued to the company confirming its title. Obviously it was the intention of Congress that, upon the completion of the railroad, the Company was to be put in full possession of its grant.

4. The railroad was completed to the satisfaction of the Government many years ago; and had the Government done what in the 6th section it promised to do the question presented on this record could not have arisen. But it did not do this. It did not have the lands surveyed "as fast as might be required for the construction of said railroad." A very large part of the grant was

not surveyed at all and remains unsurveyed to this day. So long as the place lands remained unsurveyed the Company was, of course, uncertain how much of its place land had been lost through occupancy previous to definite location; and so long as the indemnity lands remained unsurveyed, it was powerless, under the rulings of the Department (*Northern Pacific Railroad Company*, 15 L. D. 8) to make selections within the indemnity limits even for known losses within the place limits.

5. But though the Government did not keep its promise to survey and patent the lands as fast as the road was constructed, the Department of the Interior for a long time did what, as regards protecting the indemnity belts from depletion, was the next best thing; that is to say, it withdrew from sale or entry, immediately on filing map of definite location, not merely the odd numbered sections within place limits, but, as well, the odd numbered sections within indemnity limits. The result was that when and as the indemnity belts were surveyed the odd numbered sections, having been withdrawn from settlement, were, of course, unaffected either by adverse entries or by occupancies which the Department would recognize as initiating rights, and were available for selection in lieu of place losses.

6. This practice continued until 1887, when it was discontinued by Secretary Vilas. The question of its propriety was examined at length by him in the case of *Guilford Miller v. Northern Pacific Railroad Company*, 7 L. D. 100, and his reasons for discontinuing it are there stated. This decision was rendered in 1888 and the principles announced in it were ratified or affirmed in 1900 in *Hewitt v. Schultz*, 180 U. S. 139. The result of the discontinuance of the practice was to throw the indemnity belts open to settlement; and as the settler could initiate rights by occupancy in advance of survey (*Oregon & California Co. v. U. S.*, 189 U. S. 103) while the Railroad Company could make no selection until after survey, the number of odd-numbered sections available for selection of course dwindled as time went on.

7. Some time after the decision in the *Guilford Miller case, supra*, the Commissioner of the General Land Office, proceeding under the authority of the Act of March 3, 1887 (24 Stat. 556), which required him "to adjust each of the railroad land grants made by Congress," prepared a statement which showed that there was a deficiency in the grant to the Northern Pacific Railroad Company. This statement was revised later in 1904, and in 1906 it was shown that the deficiency then amounted to something more than four millions of acres. It is admitted that this

deficiency existed on January 29, 1904, the date of the Government's withdrawal of the lands from entry. (Agreed Statement of Facts, paragraph 11; Tr. 32; Appellant's brief p. 4.)

8. On the last-named date, namely, January 29, 1904, the Commissioner of the General Land Office, proceeding under Sec. 24 of the Act of March 3, 1891 (26 Stat. 1095), withdrew from entry the lands in question, with other lands, pending determination as to the desirability of including them within the Gallatin forest reservation, and by proclamation of March 7, 1908, they were included within that reservation. (Agreed Statement of Facts, paragraph 2; Tr. 27.)

9. On the date of their withdrawal, January 29, 1904, the lands in controversy had not been surveyed, nor were they surveyed until April 5, 1905.* On that date the Railway Company (which had in the meantime succeeded to the rights of the Northern Pacific Railroad Company) selected them in lieu of mineral lands lost within the place limits of its grant. They were, in all respects, subject to such selection, except for the withdrawal order of January 29, 1904. (Agreed Statement of Facts, paragraph 3; Tr. 28.)

*This date is erroneously stated as April 5, 1906, in the Agreed Statement of Facts. (Tr. 28). April 5, 1905, is the correct date as appears from the Government's bill (Tr. 7) and the Railway Company's answer (Tr. 24).

10. June 24, 1909, patent covering these lands was issued to the Railway Company. November 6, 1914, the Acting Assistant Commissioner of the General Land Office called upon the Railway Company to reconvey the lands in question to the United States upon the ground that, as they had been withdrawn on the date of their selection, the patent was erroneously issued. (Agreed Statement of Facts, paragraphs 6 and 7; Tr. 3.) The Company refused to reconvey and in consequence this suit was brought.

ARGUMENT.

1. The act of 1864 and the resolution of 1870 constituted a contract between the Government and the Railroad Company. No one disputes this. What was said by this court of similar legislation in the case of *Burke v. Southern Pacific Railroad Company*, 234 U. S. 669, 679, is conclusive.

> "We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratui-

tous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described."

The Northern Pacific Railroad Company performed its part of this contract by building its railroad. It has borne, and its successor, the Northern Pacific Railway Company, is now bearing, and must for all time continue to bear the burdens, in the way of restricted charges for Government transportation, which, under the 11th

section of the act of 1864, Congress has imposed. The question here is as to performance not of the Railroad Company's but of the Government's part of the contract.

2. It is equally clear that it was the intention of Congress that the grantee should get the full quantity of lands granted, at least so far as it was possible to get it within the limits of the grant. As said by this court in *Wisconsin Central Railroad Company v. Forsythe*, 159 U. S. 46, 60, "When Congress makes a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land."

What is said in *Hewitt v. Schultz*, 180 U. S. 139, 157, and in the dissenting opinion in that case at page 160, and in *Southern Pacific v. Bell*, 183 U. S. 675, at page 689, and in *Oregon & California Railroad Company v. United States*, 189 U. S. 103, at page 115, and in *Humbird v. Avery*, 195 U. S. 480, at page 508, must remove any possible doubt that may exist on this point. All these cases recognize the Congressional intent to have been as stated in the *Forsythe* case, *supra*. Indeed, we do not understand counsel for the Government to question this; for while they argue (p. 14) that Congress did not "intend *to guarantee* any specific amount of land to the Company," (and this of course is true) they speak of

the "moral obligation," to indemnify the Company for losses within the place limits as one to be discharged by Congress and not by the courts (p. 15, 16).

3. Without pausing to dwell on the reason why there is a deficiency in the grant to the Northern Pacific, the fact that there is one has long been known; and the question is whether this fact in any way affects the general rule governing the initiation of title to indemnity lands. Undoubtedly the general rule as to such lands is that until they are selected by the grantee the Government has complete control over them; but this rule rests upon an assumption that where one indemnity section is disposed of, another is available. The rule does not obtain where this assumption is shown to be unwarranted.

The effect of a recognized deficiency on the rights of a railroad grantee was first considered by this court in *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1. That case involved a question of priority between two conflicting railroad grants. It was held that the Northern Pacific grant, as the elder grant, carried the title to the lands within the area in conflict. The St. Paul & Pacific Company said that even if this were true as to lands within the place limits of the Northern Pacific grant, still the rights of the Northern Pacific Com-

pany were not superior as to the lands within the indemnity limits because there was no evidence that those lands had been selected. The court said:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

This principle has never been overruled. It was recognized (though the decision was reached on other grounds) in *U. S. v. Southern Pacific Railroad Company*, 146 U. S. 615, at page 616; and again in *Southern Pacific v. Bell*, 183 U. S. 675, at page 682, where the court spoke of it as an exception to the general rule that a railroad grantee acquires no title to indemnity lands until selection. In *Southern Pacific Company v. Groeck* 87 Fed. 970, 973, the Circuit Court of Appeals for the Ninth Circuit, in an opinion written by Judge Gilbert, referred to the principle in the same way.

4. That the fact of a recognized deficiency in the entire grant makes inapplicable the general

rule that selection is necessary to the initiation of any rights in indemnity lands, is made strikingly plain by the decisions of this court in *Hewitt v. Schultz, supra*, and in *Oregon & California Railroad Company v. United States, supra.*

The *Hewitt-Schultz* case is a leading case in railroad grant law. It is upon that case that the Government places its main reliance (brief pp. 9-15); and it was in that case that the action of the Department in refusing to protect the railroad grantee against settlers' claims by withdrawing indemnity lands from entry was approved by this court. The question of the propriety of such a withdrawal was the main question in the case, and to it most of the opinion is devoted. But the fact of the deficiency was urged as an additional consideration by counsel supporting the railroad title, and the court, speaking through Mr. Justice Harlan, said:

> "It is appropriate to refer to one other matter. It appears from the finding of facts that Mr. Lamoreux, when Commissioner of the General Land Office, issued a certificate dated May 2, 1896, in which it was stated: 'I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of lands excepted from and lost to said grant within its

primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are, or will be when surveyed, available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office.' It does not appear from the finding of facts that this certificate was given in any proceeding pending between parties in the Land Department. On the contrary, the Commissioner of the General Land Office, in a supplemental report for the year 1899, referred to the grant to the Northern Pacific Railroad Company, and said: 'In view of the large quantities of unsurveyed lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it; of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the act of July 1, 1898, and the right of selection for lands within the Mount Rainier forest reserve under the act of March 2, 1899, and the prospect of the creation of other forest reserves within the limits of the grant, I am of the opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of 1864.' Besides, in *Northern Pacific Railroad Company*, 25

L. D. 511, and in *Northern Pacific Railroad Company v. Streib*, 26 L. D. 589, it was found that there never had been any ascertained deficiency in the grant to the Northern Pacific Railroad Company. In the above case in 26 L. D. the Secretary of the Interior, referring to the certificate of Commissioner Lamoreux, said: 'Relative to the certification of a deficiency in the grant to this company (the Northern Pacific) made by your predecessor, it is sufficient to say that this department has never given recognition to that certificate, nor has the company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant.' So that if the question whether there has been a deficiency in the grant of lands to the Northern Pacific Railroad Company was at all material in the present case, no effect can be given to the certificate of Commissioner Lamoreux set out in the findings of fact."

In a dissenting opinion, in which Mr. Justice Shiras concurred, Mr. Justice Brewer said:

"That in the actual administration of the Northern Pacific land grant such withdrawals of land within the indemnity limits were proper is clear from the certificate of the Commissioner of the General Land Office, of date May 2, 1896, and in evidence in this case, to the effect that there is a known deficiency of 3,559,222 acres of the grant which cannot be satisfied from the limits recognized

in the department. As this certificate was the only evidence in the case and was incorporated by the trial court into its findings of fact, it would seem that our inquiry in this direction should be limited thereby. But in the opinion of the majority, there is a reference to a report of the Land Department, made a year after the decision in this case, and to two opinions of the Secretary of the Interior, announced about the time of the decision. In these some question is made of the accuracy of this certificate. It will be noticed that in neither report nor opinions is the fact of a deficiency denied, but only a suggestion as to the amount thereof. It is, of course, not a pleasant fact that by reason of the change in the ruling and practice of the Land Department the Northern Pacific Railroad Company fails to receive the full measure of its grant, and I do not wonder at any effort to discredit the fact or minimize the amount of such loss, but I submit that in the disposition of this case we ought to be guided by the evidence before us and not be misled by recent speculations of the department concerning what may yet be developed."

Had the court been of opinion that the general rule was applicable notwithstanding the deficiency, it is plain that it would have said so. It rejects the contention, not upon the ground that the deficiency, if shown, would be irrelevant, *but upon the ground that it was not shown.*

In *Oregon & California Railroad Company v. United States, supra,* where this question was again presented, the court said:

> "It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition prior to definite location by sale and otherwise of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an *adjustment* of the grant of lands in respect of place limits. In any event, no such *adjustment* having taken place prior to the date of the settler's bona fide occupancy, his rights, based upon such occupancy would not be affected by the fact, subsequently appearing, in whatever way, that all the odd-numbered sections within the indemnity limits were needed to supply deficiencies in place limits. At the time the settler went upon the land, in good faith, to make it his home and to perfect his title under the homestead laws, there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws."

Here again the ground on which the court rejects the contention is not that it is irrelevant, but that in that case there had not been what in this case there *has* been, namely, an adjustment of the

grant showing the deficiency previous to any initiation of an adverse claim.

In *Southern Pacific Railroad Company v. Bell, supra*, an actual deficiency in the grant was not shown; but the possibility of such a deficiency if homestead entries were allowed was urged as a reason why indemnity lands should be withdrawn from entry. The court, speaking through Mr. Justice Brown, said:

> "It is true that, prior to this selection being made, many of these indemnity lands may be taken up, and an insufficient amount left for the railroad (and we do not deny the force of the dissenting opinion in *Hewitt v. Schultz* in that connection), but we think this possibility serves rather as a basis for a further action by Congress, such as was made in the Northern Pacific case by the joint resolution of May 31, 1870 (16 Stat. 378), than as a reason for withdrawing from settlement a vast amount of land which the railroad may never have occasion to require."

The court will observe that in each of these three cases the dispute was between the railroad company *and a homestead settler;* and even as against *a homestead settler* the fact of a deficiency was thought to have such a bearing upon the question of the rights of the railroad grantee within the indemnity belt that it was dealt with in the way shown. But our case is much stronger. The rights of the settler as against the Railroad

grantee are not involved here. Those rights we freely concede. Notwithstanding the fact that in the *Hewitt-Schultz* case, and in the *Oregon & California* case, the court treats the fact of a deficiency as something which might operate to defeat *even the claim of a settler* whose rights were initiated after the deficiency was ascertained, we gave that proposition up long ago. We conceive that notwithstanding the strong language of the court in these cases, and in *St. Paul & Pacific v. Northern Pacific, supra*, we could not prevail *as against the settler* because under the doctrine of the *Guilford-Miller* case, which this court in the *Hewitt-Schultz* case substantially adopts, it was *a part of our contract* that, until selected, lands within the indemnity belt should be open to settlement under the homestead and pre-emption laws. Losses of indemnity lands to settlers, therefore, are matter of daily occurrence. They have been taking place ever since the *Guilford-Miller* case was decided, and it is because of them that the deficiency has become so great. The question here is not whether in the face of the deficiency *the settler* may acquire rights superior to ours, for we concede that he may; it is whether the Government may lawfully appropriate *to its own* uses lands which are indispensable even to a partial fulfillment of its contract.

5. The answer of counsel for the Government to all this is direct and simple. They take their stand upon the broad general rule to which we have referred, that until selection a railroad grantee acquires no title to indemnity lands. Undoubtedly this court has said this, or something like this, many times. But on examining the cases it will be found that wherever this is said, it is said *sub modo* and with reference to the special facts in hand. It has never been said or suggested that as to such lands the grant *meant nothing*, or that even though they were confessedly needed to supply losses within place limits, the Government, in advance of selection, was as free to deal with them as if the grant had not been made. The decisions above cited directly negative any such doctrine; and in *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 387, the court, speaking through Chief Justice White, said:

> "It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat. 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat. 378, extending the indemnity limits, that it was the purpose of Congress in making the grant *to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits.*"

In *Daniels v. Wagner*, 205 Fed. 235, 237, the Circuit Court of Appeals of the Ninth Circuit, speaking through Judge Gilbert, said:

> "In considering in the light of the adjudications the question here presented, it is essential to bear in mind the distinction between the right acquired by a railroad company, under a Congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the act of June 4, 1897. The former is *a substantial right* in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an act of Congress or by other authority."

The decision in the case last cited was reversed by this court (*Daniels v. Wagner*, 237 U. S. 547) but upon other grounds.

6. Counsel for the Government in their brief betray, as we think, a misconception of the ground on which we rest our case, and on which both of the courts below have sustained us. They argue as though we were contending for a principle which would deprive settlers of the right they now enjoy of acquiring title to odd-numbered sections within the indemnity belts. As already shown, we

contend for nothing of the kind. Nor is it true that we rest our case in any sense upon the fact that the Government has failed to perform its obligation to survey the lands. Certainly the failure of the Government in this regard has been most flagrant,* but we do not complain of it or in any sense rely upon it. Nor are we complaining that as the result of this delay the indemnity lands are being taken up by settlers and irretrievably lost to us. For thirty years, or since the decision in the *Guilford-Miller* case, we have faced these facts and have become, if not reconciled, at least accustomed to them. Our complaint in this case is not of the Government's inaction, but of its action; not of what it has neglected to do, but of what it is doing. We say that if it will not survey the lands as it agreed to do, if it will not allow us to select them while unsurveyed, if as a consequence we must suffer the losses occasioned by settlers' entries, we are entitled at least to protection against additional losses occasioned by its own acts. Its appropriation of these lands *to its own purposes* in the face of its admission that they are necessary to satisfy even partially the grant which

*On page 18 of their brief counsel for the Government quote from the decision of this court in the *Oregon & California case*, 189 U. S. 116, for the purpose of showing that it is for the Land Office to determine when the survey is to be made. Of course this is true where the statute merely provides, as in the *Oregon & California case*, that the lands shall be surveyed with all "convenient speed." But the Northern Pacific statute, as we have already pointed out, contained the positive promise to survey the lands *"as fast as may be required by the construction of said railroad."*

it made for a consideration which we have rendered would be a plain violation of its contract. It would be a moral as well as a legal wrong; and surely it is not true that those who contract with the Government must expect to have their contracts dealt with in any such way.

Counsel say (p. 13) that:

> "If there was no obligation upon the Government to secure these lands from private appropriation, much less was there a duty on the part of the Government not to appropriate the lands for its own purposes in pursuance of an established national policy."

And again:

> "Until such a filing is made, there is less reason for saying that the Government cannot appropriate these lands for its own purposes than there is for saying that settlers cannot do so, and yet the right of settlers to acquire such lands at any time prior to the filing of the list is unquestionable."

But this argument overlooks the fact that the question is one of *contract*. Why is it that "the right of settlers to acquire such land is unquestionable"? They have a right to acquire them because the effect of the decision in *Hewitt v. Schultz* is that *it was a part of the contract* between the Government and the Railroad Company that they should have the right to do so. But will the Government say that it was a part of

the contract that the indemnity provisions of the grant were meaningless, or that the Government was free at any time (even after the ascertainment of a deficiency in the grant), to recall the promise it had made or to render those provisions nugatory? And if the Government does advance any such contention, how can they square it with what was said by this court in the *St. Paul & Pacific case*, or with the language in *Weyerhaeuser v. Hoyt*, where, speaking through the Chief Justice, the court said that "it was the purpose of Congress in making the grant *to confer a substantial right* to lands within the indemnity limits in lieu of lands lost within the place limits?" How can that right be called "substantial" which the Government is privileged to ignore?

7. Bearing in mind that the withdrawal order of January 29, 1904, was made under the authority of Section 24 of the Act of Congress of March 3, 1891 (26 Stat. 1095) authorizing the President to set apart "public lands" as forest reserves, we submit that one of two things must be true: Either the lands in question, in view of the admitted facts in this case, were not "public lands" within the meaning of that act, and therefore the withdrawal order was unauthorized and inoperative; or, they are "public lands," and then the act authorizing their withdrawal was a direct invasion of the constitutional rights which the

Railway Company had in them; and such legislation cannot stand.

As said by this court in the *Sinking Fund cases*, 99 U. S. 700, 718:

> "The United States cannot, any more than a state, interfere with private rights, except for legitimate Governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contract as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

In sustaining the right of the Railway Company to the lands in question the District Court and the Court of Appeals have merely recognized and applied these principles.

CHARLES W. BUNN,
CHARLES DONNELLY.

UNITED STATES v. NORTHERN PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 325. Argued October 7, 1920.—Decided April 11, 1921.

1. The Northern Pacific Railroad Act of July 2, 1864, c. 217, 13 Stat. 365, and the Joint Resolution of May 31, 1870, 16 Stat. 378, embodied a proposal that, if the company would bring about the construction and operation of the railroad, desired for the advantage of the Government and the public, it should receive in return the land comprehended by the granting provisions of the legislation. P. 63.
2. By the company's acceptance of this proposal, followed by construction and operation of the railroad and acceptance of the railroad by the President, the proposal was converted into a contract, entitling the company to performance by the Government. P. 64.
3. The provision relating to indemnity land was as much a part of the grant and contract as the one relating to land in place; and the right of the grantee to land within the indemnity limits in lieu of land lost within the place limits was intended to be a substantial right such as is protected by the due process clause of the Constitution. P. 64.
4. Assuming that the land applicable as indemnity remaining within the indemnity limits was not enough to make up for unsatisfied losses in the place limits, the Government could not deprive the company's successor of its right to such land by setting it aside for forest purposes. Pp. 64–66.
5. The rule that, under such a grant, no right of the railroad company to land within the indemnity limits attaches to any specific tract until the company has selected it, applies as between the company and settlers under the homestead and preëmption laws (the continued operation of which within the indemnity limits the granting act itself provides for), and applies also as between the company and the United States when the lands available for indemnity exceed the losses, but it has no application as between the company and the United States if the lands available for indemnity are insufficient for that purpose. P. 65.
6. The question whether lands remaining within the indemnity limits

were sufficient to satisfy losses in the place limits was primarily for the Land Department to decide. P. 67.

7. But, where the Department, without deciding this question, reserved part of the indemnity lands for forest purposes, and afterwards inadvertently issued a patent therefor to the railroad company upon its selection, *held*, that the question could be determined in a suit brought later by the Government against the company to set the patent aside, but only upon a clear showing of the facts, since the decision might conclude both parties as to other lands as well as those immediately involved. P. 67.

8. A report of the Commissioner of the General Land Office on the adjustment of a railroad land grant showing a deficiency is not enough to establish the existence of such deficiency, unless shown to have been approved or consented to by the Secretary of the Interior, since, under the adjustment Act of March 3, 1887, the supervision of the adjustment was specially devolved upon the Secretary. P. 67.

9. A stipulation that all the lands received by the Northern Pacific Company under its grant and all that it was possible for it to receive thereafter, whether as place or indemnity lands, did not equal the sum-total of all the odd-numbered sections within the primary or place limits, *held*, not enough to establish a deficiency, since the measure of the grant might be less than the aggregate of the odd-numbered sections within the place limits, due to partial overlapping with another like grant (*Southern Pacific R. Co.* v. *United States*, 183 U. S. 519), or to deductions under § 6 of the granting act if the route followed the general line of another railroad with a prior grant; and of the presence or absence of such conditions the courts could not take judicial notice. P. 68.

10. The existence of such a deficiency when the Government withdrew the lands in controversy is not established by a finding by the Secretary of the Interior that a deficiency existed six years later. P. 69.

264 Fed. Rep. 898, reversed.

THE case is stated in the opinion, *post*, 58.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for the United States:

No rights to lands within the indemnity limits attach until an application to select is filed. *Ryan* v. *Railroad Co.*, 99 U. S. 382, 386; *St. Paul & Sioux City R. R. Co.* v.

Winona & St. Peter R. R. Co., 112 U. S. 720, 731; *Oregon & California R. R. Co.* v. *United States, No. 1*, 189 U. S. 103, 112, 113; *Osborn* v. *Froyseth*, 216 U. S. 571, 577, 578; *United States* v. *Southern Pacific R. R. Co.*, 223 U. S. 565, 570, 571.

As the lands involved were at the date of filing of the selection list already withdrawn for forestry purposes, they were not subject to selection. *United States* v. *Midwest Oil Co.*, 236 U. S. 459; Act of March 3, 1891, c. 561, § 24, 26 Stat. 1095, 1103; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 356. Hence there were no rights taken away by or in conflict with the withdrawal.

There is no obligation upon the part of the United States to preserve lands within indemnity limits for the benefit of the company. *Hewitt* v. *Schultz*, 180 U. S. 139; *Northern Pacific R. R. Co.* v. *Miller*, 7 L. D. 100, 120; *Northern Pacific R. R. Co.* v. *Davis*, 19 L. D. 87, 90. The entire contention of appellee in this regard ignores the vital point that the company secures no rights to lands within the indemnity limits until a filing is made. Until such a filing is made, there is less reason for saying that the Government cannot appropriate these lands for its own purposes than there is for saying that settlers cannot do so, and yet the right of settlers to acquire such lands at any time prior to the filing of the list is unquestionable. It would be unreasonable to assert that although the Government could reserve lands within the place limits prior to the time when the company's rights attached, yet it could not reserve lands within the indemnity limits prior to the time when the company's rights thereto were initiated. Rights in the place limits attached by the definite location of the road; in the indemnity limits by the filing of an application to select. Congress clearly recognized that there would be losses in the place limits, and therefore provided for indemnity, but there was no

promise that the indemnity would be sufficient or that all losses in the place limits would be compensated by the lands in the indemnity limits. *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 512. The lands in the indemnity belt might, before the company's rights attached, be otherwise disposed of. They might all prove to be mineral. The company took the grant subject to these possibilities, and the same thing is true as to other appropriation. If the company feels that there is a moral obligation on the part of the Government to give it indemnity for all losses in the place limits, when the lands in the indemnity belt are not available because of previous appropriation, its appeal should be made to Congress. *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 689; *Humbird* v. *Avery*, 195 U. S. 480, 508.

Grants of this character are construed strictly against the grantee, and in the absence of a clearly expressed purpose to preserve the lands within indemnity limits for the company no such purpose should be presumed.

We do not consider the action of the company in filing blanket selections without assigning definite losses, or in applying for all the lands within the indemnity limits, to have strengthened its position. The requirement for approval of the selection lists by the Secretary of the Interior would be a vain thing if it were to be given to a list not supported by a definite showing of specific losses. The Land Department has required assignment of a definite base. Circular of August 4, 1885, 4 L. D. 90; *St. Paul, M. & M. Ry. Co.* v. *Munz*, 17 L. D. 288. As to applications for unsurveyed lands, those were clearly unacceptable and could not properly be made until the lands were identified by survey. This has been the rule of the Land Department. 27 L. D. 122.

The compilation of losses made by the Commissioner of the General Land Office and here adduced as proving that lands unappropriated were in the indemnity limits

and insufficient to satisfy losses in the place limits, has no material bearing on the issues here. Furthermore, it was not approved by the Secretary of the Interior. See *Hewitt* v. *Schultz*, 180 U. S. 139, 157, 158.

The failure of the Government to have the lands sooner surveyed, the inference being that thereby the company was prejudiced, is not material. *Oregon & California R. R. Co.* v. *United States, No. 2*, 189 U. S. 116, 118; *United States* v. *Missouri, Kansas & Texas Ry. Co.*, 141 U. S. 358, 374.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for appellee:

The Act of 1864 and the Resolution of 1870 constituted a contract between the Government and the railroad company. *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679.

The Northern Pacific Railroad Company performed its part of this contract by building its railroad. It has borne, and its successor, the Northern Pacific Railway Company, is now bearing, and must for all time continue to bear the burdens, in the way of restricted charges for government transportation, which, under § 11 of the Act of 1864, Congress has imposed. The question here is as to performance not of the railroad company's but of the Government's part of the contract.

It is equally clear that it was the intention of Congress that the grantee should get the full quantity of lands granted, at least so far as it was possible to get it within the limits of the grant. *Wisconsin Central R. R. Co.* v. *Forsythe*, 159 U. S. 46, 60; *Hewitt* v. *Schultz*, 180 U. S. 139, 157, 160; *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 689; *Oregon & California R. R. Co.* v. *United States, No. 1*, 189 U. S. 103, 115; *Humbird* v. *Avery*, 195 U. S. 480, 508. All these cases recognise the congressional intent to have been as stated in the *Forsythe Case*, *supra*.

Indeed, we do not understand counsel for the Government to question this; for while they argue that Congress did not "intend to guarantee any specific amount of land to the company," (and this of course is true) they speak of the "moral obligation" to indemnify the company for losses within the place limits as one to be discharged by Congress and not by the courts.

Without pausing to dwell on the reason why there is a deficiency in the grant to the Northern Pacific, the fact that there is one has long been known; and the question is whether this fact in any way affects the general rule governing the initiation of title to indemnity lands. Undoubtedly the general rule as to such lands is that until they are selected by the grantee the Government has complete control over them; but this rule rests upon an assumption that where one indemnity section is disposed of, another is available. The rule does not obtain where this assumption is shown to be unwarranted. *St. Paul & Pacific R. R. Co.* v. *Northern Pacific R. R. Co.*, 139 U. S. 1; *United States* v. *Southern Pacific R. R. Co.*, 146 U. S. 615, 616; *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 682; *Southern Pacific R. R. Co.* v. *Groeck*, 87 Fed. Rep. 970, 973.

That the fact of a recognized deficiency in the entire grant makes inapplicable the general rule that selection is necessary to the initiation of any rights in indemnity lands, is made strikingly plain by the decisions in *Hewitt* v. *Schultz*, *supra*, and *Oregon & California R. R. Co.* v. *United States*, *No. 1*, *supra*.

The question here is not whether in the face of the deficiency the settler may acquire rights superior to ours, for we concede that he may. It was a part of our contract that, until selected, lands within the indemnity belt should be open to settlement under the homestead and preëmption laws. The question is whether the Government may lawfully appropriate to its own uses lands

which are indispensable even to a partial fulfillment of its contract.

The answer of counsel for the Government to all this is direct and simple. They take their stand upon the broad general rule that until selection a railroad grantee acquires no title to indemnity lands. Undoubtedly this court has said this, or something like this, many times. But on examining the cases it will be found that wherever this is said, it is said *sub modo* and with reference to the special facts in hand. It has never been said or suggested that as to such lands the grant meant nothing, or that even though they were confessedly needed to supply losses within place limits, the Government, in advance of selection, was as free to deal with them as if the grant had not been made. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387; *Daniels* v. *Wagner*, 205 Fed. Rep. 235, 237, reversed upon other grounds, 237 U. S. 547.

We are not contending for a principle which would deprive settlers of the right they now enjoy of acquiring title to odd-numbered sections within the indemnity belts; nor do we rest our case in any sense upon the fact that the Government has flagrantly failed to perform its obligation to survey the lands. We say that if it will not survey the lands as it agreed to do, if it will not allow us to select them while unsurveyed, if as a consequence we must suffer the losses occasioned by settlers' entries, we are entitled at least to protection against additional losses occasioned by its own acts. Its appropriation of these lands to its own purposes in the face of its admission that they are necessary to satisfy even partially the grant which it made for a consideration which we have rendered would be a plain violation of its contract. It would be a moral as well as a legal wrong; and surely it is not true that those who contract with the Government must expect to have their contracts dealt with so.

Bearing in mind that the withdrawal order was made

under the authority of § 24 of the Act of March 3, 1891, 26 Stat. 1095, authorizing the President to set apart "public lands" as forest reserves, we submit that one of two things must be true: Either the lands in question, in view of the admitted facts in this case, were not "public lands" within the meaning of that act, and therefore the withdrawal order was unauthorized and inoperative; or, they are "public lands," and then the act authorizing their withdrawal was a direct invasion of the constitutional rights which the railway company had in them; and such legislation cannot stand. *Sinking-Fund Cases*, 99 U. S. 700, 718.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the United States to cancel a patent issued to the railway company for 5,681.76 acres of land in Montana, the asserted ground for such relief being that the land officers issued the patent through inadvertence and mistake. The company prevailed in the District Court and in the Circuit Court of Appeals, 264 Fed. Rep. 898, and the United States brought the case here.

The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.

The grant was made for the declared purpose of "aiding in the construction" of a proposed line of railroad from Lake Superior to Puget Sound and Portland, Oregon,

and "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores" over such line. It was expressed in present terms—"there be, and hereby is, granted"—and was of "every alternate section of public land, not mineral, designated by odd numbers" within prescribed place limits on each side of the line, excepting such sections or parts of sections as should be found to have been otherwise disposed of, appropriated or claimed, or occupied by homestead settlers, or preëmpted, prior to the definite location of the line. *Nelson* v. *Northern Pacific Ry. Co.*, 188 U. S. 108. As indemnity for any lands so excepted, as also for any excluded as mineral, other lands were to be "selected by said company," under the direction of the Secretary of the Interior, from unoccupied, unappropriated, nonmineral lands in odd-numbered sections within prescribed indemnity limits. The line of the road was to be definitely located by filing a map or maps thereof in the General Land Office; and the road when constructed was to be "subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation." As each consecutive twenty-five miles of road was constructed and made ready for the service contemplated, the same was to be examined by commissioners selected by the President, and, if they reported that the same was completed in all respects as required, patents were to be issued to the company for the lands opposite to and coterminous with the completed section. The President was to cause the lands along "the entire line" to be surveyed for forty miles in width on both sides "after the general route shall be fixed, and as fast as may be required by the construction of said rail road"; the granted sections within the place limits were to be withheld from sale, entry and preëmption, except as against preëmption and

homestead occupants whose settlement preceded the definite location of the line; all lands within the indemnity limits were to be and remain subject to the operation of the preëmption and homestead laws, save as the odd-numbered sections should be taken out of the operation of those laws by indemnity selections made to supply losses within the place limits (*Hewitt* v. *Schultz*, 180 U. S. 139, 147–149, 155–156; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387–388); and the price of the even-numbered sections retained by the United States in the place limits was to be increased to double the usual minimum. If the company accepted the terms on which the grant was made, it was required to signify its acceptance in writing under its corporate seal within two years.

The company duly accepted the terms of the grant, filed appropriate maps of the general route, afterwards definitely located the line in the mode prescribed, and constructed and completed the road from Ashland, Wisconsin, on Lake Superior, to Tacoma, Washington, on Puget Sound, and thence to Portland, Oregon, its full length being more than 2,000 miles. The definite location was completed in 1884 and the construction in 1887. The road as completed was examined and favorably reported by the commissioners and accepted by the President. Reports of Commissioner of Railroads—for 1885, p. 22; 1886, p. 36; 1887, p. 24; 1888, p. 24; *Doherty* v. *Northern Pacific Ry. Co.*, 177 U. S. 421; *United States* v. *Northern Pacific R. R. Co.*, 95 Fed. Rep. 864; s. c. 177 U. S. 435; *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1.

The losses to the grant in the place limits through other disposals, homestead settlements and the like prior to the definite location of the line, and through the exclusion of lands found to be mineral, amounted to several million acres. To supply these losses it was necessary to resort to the indemnity limits, as was contemplated and provided in the granting act and resolution. In the asserted exer-

cise of this right the company selected the lands in question. The particular losses on account of which the selection was made were such as to support it, the selection was made in conformity with the directions given by the Secretary of the Interior, and the lands selected were subject to selection unless rendered otherwise by a temporary executive withdrawal made about a year before. The local land officers accepted and approved the selection list and in transmitting it to the General Land Office called attention to the withdrawal. But when the Commissioner and the Secretary approved the selection and caused the patent to issue they overlooked the withdrawal and so did not consider or pass on its bearing on the company's right to select the lands. Five years later the matter was called to their attention and they caused this suit to be brought.

The lands in question were not surveyed in the field until near 1905 and the plat of survey was not filed in the local land office until April 5, 1905. This indemnity selection was made later in the same day. On several occasions prior to 1904 the company had endeavored to select lands in the indemnity limits while they were as yet unsurveyed, or before the plat of the survey was filed in the local land office; but the Secretary of the Interior had refused to consider such selections and had directed that none be received until after the land was surveyed and the plat filed. Thus this selection was made as soon as was admissible under the Secretary's directions. The temporary executive withdrawal of the lands was made January 29, 1904, before they were surveyed, and was intended to prevent the acquisition of any claim to them pending an inquiry into the desirability of adding them, along with other lands, to an existing forest reserve. On March 7, 1906, they were added to the reserve by an executive proclamation.

In its defense to the suit the company takes the posi-

tion that the temporary withdrawal did not affect its right to select the lands and therefore that the United States was not prejudiced by the fact that the Commissioner and the Secretary overlooked the withdrawal when the selection was approved and the patent issued. In support of this position the company points to the stipulation on which the case was heard in the District Court wherein,—following a reference to the Act of March 3, 1887, c. 376, 24 Stat. 556, directing the Secretary "to immediately adjust" this and other railroad land grants, and to a special report of the Commissioner, made in 1906, purporting to show that the adjustment of this grant pursuant to that act had progressed to a point where it was disclosed there was a net deficiency in the grant of 4,092,472.99 acres,—it is said:

"The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the primary or place limits, not patented, but which passed under the grant, and also all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains; but the plaintiff does not admit that the correct measure of the grant is the aggregate area of all odd-numbered sections within the primary or place limits, or that any definite quantity of land was granted and guaranteed to the defendant by any of the acts of Congress making grants of land to the defendant or its predecessor or predecessors in interest."

And in further support of its position the company contends that where, through preëmption and homestead entries or other disposals, the available lands in the indemnity limits have been so far diminished that those

remaining are all needed to supply losses in the place limits the Government is not at liberty to reserve the remaining lands, or any of them, for its own uses and thereby to cut off the company's right to claim them as indemnity, because, as against the Government, they thenceforth are appropriated to the fulfilment of its obligation under the grant, and because the company has a vested right in the fulfilment of that obligation which all departments of the Government are bound to respect. On the other hand, counsel for the Government insist (a) that no right to lands in the indemnity limits attaches, either generally or specifically, until they are selected by the company, (b) that up to that time the Government is free to reserve them for its own purposes and thereby to cut off the right of selection, and (c) that this is so even where the losses in the place limits exceed the available lands in the indemnity limits, and although the company's purpose to claim the latter be asserted at the earliest opportunity. The question thus presented has an important bearing on the further administration and adjustment of this grant, and perhaps of others, and counsel on both sides have dealt with it accordingly. In its present form the question is new, but the principles which must control its solution are well settled.

The purpose of the granting act and resolution was to bring about the construction and operation of a line of railroad extending from Lake Superior to Puget Sound and Portland through what then consisted of great stretches of homeless prairies, trackless forests and unexplored mountains, and thus to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails, troops, munitions and public stores to and from the Pacific coast, with all the resultant advantages to the Government and the public. To that end the act and resolution embodied a proposal to the company to the effect that if it would

undertake and perform that vast work it should receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government. *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679–680. The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to land in place, *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387. Such rights are within the protection of the due process of law clause of the Constitution. *Sinking-Fund Cases*, 99 U. S. 700, 718.

When the grant was made by the act and resolution it was thought that the indemnity limits as therein defined contained lands largely in excess of what would be required to supply losses within the place limits, and hence the provision in § 6 under which, as construed by the land officers and this court, all lands in the indemnity limits were to be and remain subject to the operation of the preëmption and homestead laws, save as the odd-numbered sections should be taken out of their operation by indemnity selections. Under that provision, however, the lands available for indemnity were diminished much more rapidly than was expected; but as the provision was one of the terms of the grant the company must submit to whatever of disadvantage results from it. This the company frankly recognizes, for in its brief it says: "It was a part of our contract that, until selected, lands within the indemnity belt should be open to settlement under

the homestead and preëmption laws"; and also, "The question here is not whether in the face of the deficiency the settler [before selection] may acquire rights superior to ours, for we concede that he may." But that provision gives no warrant for thinking that, after the company has earned the right to receive the lands comprehended in the grant, the Government is free to reserve or appropriate to its own uses lands in the indemnity limits which are required to supply losses in the place limits. We say "required" because we perceive no reason to doubt that lands in the indemnity limits may be so reserved or appropriated where what remains is sufficient to satisfy all the losses.

While it often has been said that under such a grant no right attaches to any specific land within the indemnity limits until it is selected, an examination of the cases will show that this general rule never has been applied as between the Government and the grantee where the lands available for indemnity were not sufficient for the purpose. Its only application has been where either the rights of settlers were involved, or the lands available for indemnity exceeded the losses, thereby making it essential that there be a selection and identification of the particular lands sought to be taken. This distinction is illustrated in *St. Paul & Pacific R. R. Co.* v. *Northern Pacific R. R. Co.*, 139 U. S. 1. The question there presented was whether there was any need for a selection where no right of a settler was involved and the lands available for indemnity were not sufficient to supply the losses. By reason of this insufficiency it was ruled that the lands in the indemnity limits necessarily were appropriated to satisfy the losses and that no selection was required. The court said, p. 19: "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place

limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated." That ruling related to the right to indemnity lands under this grant, and so is particularly in point; but it is well to observe that what was said about an existing deficiency related, as appears on pages 8 and 9 of the opinion, to the portion of the grant in Minnesota and not to other portions. This exception to the general rule that a selection is essential has been recognized by this court in other cases. *United States* v. *Missouri, Kansas & Texas Ry. Co.*, 141 U. S. 358, 376; *United States* v. *Colton Marble & Lime Co.*, 146 U. S. 615, 616; *Southern Pacific R. R. Co.* v. *Bell*, 183 U. S. 675, 682.

One of the regulations of the Land Department requires that indemnity selections be accompanied by a specification—tract for tract—of the losses on account of which they are made. But that department holds that this regulation does not apply where the losses exceed the lands which may be taken as indemnity. Thus in *Hastings and Dakota Ry. Co.*, 19 L. D. 30, it was said by Secretary Smith: "The object in establishing the rule was to prevent the possibility of one basis of loss being used for more than one selection. As this grant is known to be deficient over eight hundred thousand acres . . . the danger of a duplication of the losses does not exist; and the reason of the rule ceasing, the rule itself does not operate." And a similar ruling is found in *Chicago, Rock Island & Pacific R. R. Co.* v. *Wagner*, 25 L. D. 458, 460, and other cases.

Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant it was not admissible for the Government to reserve or appropriate to its own uses

lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose, it could take all and thereby wholly defeat the provision for indemnity. But it cannot do either. The "substantial right" conferred by that provision (*Weyerhaeuser* v. *Hoyt*, *supra*), cannot be thus cut down or extinguished. *Sinking-Fund Cases*, *supra*.

A more difficult question—to which only slight attention is given in the briefs—is whether it sufficiently appears from this record that the grant was deficient at the time of the temporary withdrawal, that is, that the lands available as indemnity were not then sufficient to supply the losses. The question is one the determination of which rests primarily with the Land Department. The stipulation on which the case was heard does not show that the Department has determined the question, nor that it has refused to do so, but only that the question was not considered when this patent was issued, the withdrawal being then inadvertently overlooked. In these circumstances, to entitle either party to have the question determined in this suit the facts shown should make its right solution quite plain, for the decision might conclude both parties for all time,—as respects other lands as well as those in suit. *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48. Of course, the company is entitled to have the question considered and decided somewhere, and, if the deficiency be established, is entitled to have the selection of these lands sustained. A third of a century already has elapsed since the company earned the right to receive what was intended by the grant.

Two matters stated in the stipulation are relied upon as showing a deficiency. One is that in 1906 the Commissioner reported to the Secretary that the adjustment of the grant had progressed to a point where it was dis-

closed that there was a net deficiency of 4,092,472.99 acres. By the Act of March 3, 1887, *supra*, the supervision of the adjustment was specially devolved on the Secretary, and yet the stipulation does not show that he approved the Commissioner's report or in any way recognized it as correct. We think the report, in the absence of any confirmatory action by the Secretary, cannot be taken as sufficiently establishing that a deficiency existed. The other statement is that at the time of the temporary withdrawal all the lands theretofore received by the company plus all that it was possible for it to receive thereafter, whether as place lands or indemnity lands, did not equal "the sum total of all the odd-numbered sections lying within the primary or place limits," and that condition still obtains. But the statement also says that the Government "does not admit that the correct measure of the grant is the aggregate area of all odd-numbered sections within the primary or place limits." What was meant by this qualification is not otherwise disclosed; nor is it explained in the briefs. The aggregate of the odd-numbered sections within the place limits is the correct measure of the grant, unless (a) part of the grant included only a moiety of those sections,[1] or (b) the route of this road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was to be made from the amount of land granted to this company.[2] There would be no right to indemnity as respects the moiety not included, nor as

[1] *Southern Pacific R. R. Co.* v. *United States*, 183 U. S. 519, 525; *Sioux City & St. Paul R. R. Co.* v. *United States*, 159 U. S. 349, 364–365. And see *United States* v. *Northern Pacific R. R. Co.*, 193 U. S. 1.

[2] Section 3 of the granting act contains the following: "*Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

respects the lands required to be deducted. Either of those conditions, if existing, would affect the measure of the grant and would have to be considered in determining whether there was a deficiency. The stipulation does not show the presence or the absence of either condition, and the matter is not one of which courts take judicial notice. Therefore the actual situation, whatever it may have been, should have been shown. As this was not done, neither party is entitled to have the question whether there was a deficiency determined upon the present record.

Turning to the published decisions of the Land Department, we find that in *Hessey* v. *Northern Pacific Ry. Co.*, 43 L. D. 302, the Secretary distinctly declared that the grant was so far deficient that many losses within the place limits must remain unsatisfied, and therefore that compliance with a provision that indemnity selections be made from lands nearest the line of the road was no longer required. But as that finding apparently related to the situation existing December 9, 1909, it cannot be taken as showing that there was a deficiency almost six years before, when the temporary withdrawal now in question was made. The situation may have changed materially in the meantime, for doubtless large numbers of homestead entries were being made within the indemnity limits every year.

We conclude that the decrees below must be reversed and the suit remanded to the District Court with directions (a) to accord the parties a reasonable opportunity, on a further hearing, to supplement and perfect the showing made in the present record, if either or both are so disposed, (b) if the parties avail themselves of that opportunity, to proceed to an adjudication of the suit upon the record as thus supplemented, and (c) if the parties do not avail themselves of that opportunity, to enter a decree canceling the patent without prejudice to the right of the company to have the question of the asserted deficiency

in the grant determined by the Land Department and to have the present selection sustained and given full effect, if the grant was deficient when the temporary withdrawal was made.

Decree reversed.